Discussion Paper:
Matrimonial Real Property on Reserve

Cornet Consulting & Mediation
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Introduction

For many years, First Nation[1] women have urged the Government of Canada to take action to address matrimonial real property issues on reserve. Recommendations for action have included federal legislative action as well as moving more quickly toward self-government goals.

The aim of this discussion paper is to build on the contributions of others in understanding contemporary matrimonial real property issues on reserve. This paper focuses on key legal issues affecting the subject of matrimonial real property on reserve and the policy context in which they are situated.[2]

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[1] This paper uses the term "First Nation" or "First Nations" to refer generically to those indigenous peoples of Canada who have been subject to the federal *Indian Act* and have reserve lands that were or are now subject to the *Indian Act* land management regime. Where the context requires, the term "Indian" is used to refer to the legal status of some First Nation people as individuals under the federal *Indian Act* (as in "Indian status"). Similarly, the term "band" is used where the context requires. "Aboriginal" is used in reference to the broader notion of indigenous peoples of Canada that includes Inuit and Metis and other indigenous people regardless of "Indian" status under the *Indian Act*. The term "Indian nations" is used to refer to the indigenous peoples of the United States in accordance with the practice in that country.

[2] More specifically, the authors were asked by the Women's Issues and Gender Equality Directorate of the Department of Indian Affairs and Northern Development to prepare a discussion paper providing an analysis of policy and legal issues concerning the division of matrimonial real property on reserve that covered the following:
a) an analysis of the division of powers in the Constitution in relation to family law;
b) an overview of all federal, provincial and territorial family law legislation addressing matrimonial real property, including the possession and interim possession of the matrimonial home, valuation of the matrimonial home and division of the matrimonial real property;
c) an overview of how the law treats traditional "marriages" and common law relationships;
d) an overview of the various land allotment regimes on reserve including the land allotment provisions under the *Indian Act*;
e) an overview of case law on the inapplicability of federal/provincial/territorial family law regarding the division of matrimonial real property and other orders regarding occupancy and possession of the real property where the matrimonial home is situated on reserve;
f) an overview of case law respecting division of real property on breakdown of a traditional marriage and a common law relationship;
g) an analysis of the impact of the limitation on the applicability of provincial family law on reserve;
h) an overview of all provincial and territorial legislation that provides protection for family members, including spouses and common-law partners, in the case of family violence (and any case law on the

Framing the Issues

Law often reflects specific cultural values. Canadian family law affecting matrimonial real property (statute law and case law) predominately reflects the cultural values of non-Aboriginal people and European-sourced legal traditions.

The legal analysis used in this paper is primarily centred in values and assumptions typical of non-Aboriginal legal traditions, such as the notion of individuals having entitlements to property to the exclusion of other members of the community. This flows from certain legal realities such as the fact that the *Indian Act* has been a vehicle for introducing and imposing notions of private property ownership in many First Nation communities. (See discussion in the section of this paper entitled "The Historical Context.") This also results from the use of the off-reserve legal situation as a standard to compare and assess the situation of people living on reserve. However, as this paper will show, non-Aboriginal property concepts are often regarded by First Nation people as having a negative and disruptive impact on First Nation cultures (and specifically communal values in relation to property). A key issue is how matrimonial real property reform should respond to the cultural interests of First Nations.

In approaching this work and identifying issues, the authors have had the benefit of some important sources that have focussed on First Nation perspectives. These include the Report of the Royal Commission on Aboriginal Peoples[3], the report of the Special Representative on Protection of First Nation Women's Rights which provided an overview of legal and policy concerns of First Nation women[4], and a body of legal and

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applicability of these laws on reserve and the impact of any limitations on their applicability on reserve);

I) a detailed description of the *First Nations Land Management Act* and examples of self-government agreements addressing the issue of the disposition of matrimonial real property on the breakdown of a relationship or family violence matters;

j) an overview of any other relevant models outside a reserve context (e.g. what happens when the family home is "public housing");

In addition, the analysis of the matters in paragraphs (g) and (h) above, is to include consideration of the following fact situations:

I) both spouses or common-law partners are band members;
ii) only one spouse or common-law partner is a band member;
iii) minor children of one or both band members are involved;
iv) the band uses the Certificate of Possession system;
v) the band uses a custom allotment system;
vi) the marriage is legal, or the relationship is a common law partnership, or the marriage is a traditional one;
vii) the real property is the only or nearly the only asset of the marriage; and
viii) additional housing is not available on reserve.

[3] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.4, Chapter 2.

[4] Mavis A. Erickson, "Where are the Women?: Report of the Special Representative on the Protection of First Nation women's Rights", January 12, 2001.

academic work by many First Nation scholars, legal advocates and First Nation women's organizations.[5]

Analyzing the subject of "matrimonial real property," in a reserve context, and in a manner that is useful to both government and First Nations, is inherently difficult. There are different views, for example, about the extent to which the Canadian legal system and the *Indian Act* in particular continue to perpetuate culturally oppressive and patriarchal legal systems.[6] This paper cannot presume to reconcile such different perspectives. This paper will show, however, that the *Indian Act* land management regime has interfered considerably with First Nation traditions and values respecting land and family and with women's relationship to their lands and families. These impacts must be taken into account in considering any initiatives for reform or action on matrimonial real property on reserve.

The authors were particularly fortunate to have the opportunity to hear the perspectives and to learn from the very knowledgeable women who participated in three Matrimonial Real Property On Reserve Focus Groups ("Focus Groups"). The Focus Groups were organized by the Women's Issues and Gender Equality Directorate of the Department of Indian Affairs and Northern Development and held in Ottawa in March 2002 and July 2002. In total, forty First Nation women participated in these discussions. The discussions were not intended to be a formal government consultation process. The participants kindly agreed to provide their insight and knowledge and they indicated clearly that they were not consenting to the use of their views to rationalize or support any particular action by government in the future. We have relied extensively on the discussion in the Focus Groups in our efforts to present a picture of the overall context for matrimonial real property issues on reserve today.

Most Focus Group participants affirmed the critical need for strategies to address property rights and issues affecting persons in all types of conjugal relationships on reserve, e.g., married under provincial law, married under Aboriginal customary law, common-law relationships and same-sex relationships. Participants in both groups expressed the view that action must not be restricted to lawmaking activities alone –whether First Nation law, federal law or some combination of federal, provincial and First Nation law. In particular, participants saw a great need to raise awareness of matrimonial real property issues in the First Nation community generally, and for all people living on reserve lands in conjugal relationships - regardless of Indian status or band membership. People living on reserves need information and guidance about the state of the law in this area and about their rights on entering a marriage or other conjugal relationships, and on dissolution of such relationships.[7]

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[5] See for example, Native Women's Association of Canada, *Matrimonial Property Rights* (Ottawa, 1991).

[6] Mary Ellen Turpel provides a very cogent analysis of ongoing colonial impacts from approaches taken by Canadian courts in dealing with matrimonial real property issues on reserve in her article "Home/Land" in (1991) 18 *Canadian Journal of Family Law* 17. She focuses on the two leading cases, *Derrickson* v. *Derrickson* and *Paul* v. *Paul*. While acknowledging that the law does not always function in an oppressive manner, Turpel argues that First Nation perspectives, and specifically those of First Nation women, typically are ignored or silenced - even in legal cases involving issues restricted to First Nation communities like matrimonial real property law on reserve.

Women, young people and First Nation leadership were identified as key focal points for information sharing and awareness. Some participants saw a need to consider other "shared property" issues: e.g. clan relationships and adults living together in non-conjugal relationships for a long periods of time such as sisters or a parent and adult child. The question of property rights of family members not living in conjugal relationships is beyond the scope of this paper. However, these concerns demonstrate the larger cultural context in which "matrimonial real property on reserve" is situated, and how First Nation perspectives of family and family law are often broader than those of European-based legal traditions.

There was a keen awareness by Focus Group participants that matrimonial real property issues have not been the focus of much attention at the community level, and consequently, there is a lack of information about traditional and First Nation designed responses to these issues. There was a strong interest in learning about how various First Nation communities and First Nation people as individuals have dealt with these issues, whether through lawmaking, agreements or community institutions such as elders councils. Many Focus Group participants, while firmly of the view that there is a great need to raise awareness in all parts of the First Nation community, were concerned about launching public education efforts without also ensuring a capacity to provide actual assistance and remedies when needed.

Focus Group participants emphasized that any analysis of "matrimonial real property rights" on reserve would need to take into account the historical context in which these issues arise in an *Indian Act* context. For example, the fact that the *Indian Act* has been the source of various systemic barriers that have prevented First Nation women from acquiring interests in reserve land in their own right, must form part of the analytical framework - barriers such as forced enfranchisement and removal from reserves and a general preference by decision-makers (Indian agents in the past and band councils today) to assign reserve land allotments to the male partner only. (See discussion and sources in the section entitled "The Historical Context".)

It is also important to recognize that use of the term "matrimonial real property" necessarily presumes the application of several European-sourced legal concepts and assumptions, such as:

- division of property into "real" (land and things attached to the land like houses) and "personal" (cash, vehicles, pension funds, household goods, etc.)
- "ownership" of portions of land by individuals providing exclusive rights as against the rest of the world
- the capacity to place a monetary value on land and things

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[7] Issues relating to same sex relationships are mentioned where these are relevant to the overall discussion.

- narrow legal definitions of "spouses" (which often exclude couples in Aboriginal customary marriages, common law relationships and same-sex relationships)
- an assumption that matrimonial real property issues do not extend beyond to other family members who are not "spouses" or "common law partners" (however these terms are variously defined in federal and provincial statutes).

In an *Indian Act* reserve context, these concepts and values respecting property and family matters conflict in many cases with First Nation laws and values. Focus group participants emphasized that the imposition of such concepts through the *Indian Act* (for example, through the making of individual land allotments) has had significant impacts on First Nation cultural interests and community integrity.

European-sourced legal concepts concerning matrimonial real property and family matters do not take into account specific realities and values present in many First Nation communities. Focus Group participants identified the following factors:

- the fact that matrimonial real property issues often extend beyond issues between spouses and can encompass families and clans
- matrimonial real property issues on reserve extend beyond rights issues between individuals and exist in a larger context of First Nation values about relationships and responsibilities to land
- the cultural and collective value of First Nation land including that allotted to individual band members or leased to non-members.

In addition to differences in underlying values and assumptions, there are a number of factual elements that tend to distinguish matrimonial real property issues on reserve under the *Indian Act* from situations off reserve:

- absence of fee simple ownership and restrictions on alienation of interests in reserve land to non-band members
- the decision-making authority of band councils in determining allotments to individual members and in determining residency rights of non-member spouses
- conjugal relationships (whether married under provincial law, married under Aboriginal customary law, common-law relationships and same-sex relationships) often consist of persons with different legal status under the *Indian Act* or different band membership or land claim beneficiary status and accordingly, different reserve residency rights
- often limited land or housing to accommodate needs of entire membership and their families
- band owned housing on common reserve lands or band owned housing on land held by allotment to an individual band member
- distinctions in the scope of provincial law applicable to real property interests in designated lands relative to real property interests in unsurrendered reserve lands.

Participants gave examples of other areas of law that can affect and be affected by matrimonial real property rights, such as wills and estates (an area also governed on reserve by provisions in the *Indian Act*[8]). Although matrimonial property laws in an off reserve context often address the rights of surviving spouses to real property on the death of a spouse, this matter is beyond the scope of this paper which focuses on issues arising from the breakdown of a marriage or other conjugal relationship between couples of the opposite sex.

All of these factors demonstrate how real property issues between spouses and partners in various conjugal relationships on reserve must be understood in the larger context of land issues in general on reserve. In this regard, the applicable land management provisions under the *Indian Act* or alternative legal regimes such as the *First Nations Land Management Act*[9] or self-government agreements must be taken into account. In addition, there are arguments supporting recognition of First Nation inherent jurisdiction. This means consideration of the scope of band council and/or First Nation decision-making authority under federal statutes, self-government agreements and any inherent lawmaking authority protected by s. 35 of the *Constitution Act, 1982*. In some communities, traditional authority exercised by families and clans over land matters is another source of decision-making affecting matrimonial real property on reserve.

Another important contextual factor is the existence of processes to recognize and implement First Nations' self-government rights (for example through self-government and land rights negotiations and litigation). Jurisdiction over land and many other subject-matters are dealt with in such negotiations. Under the federal self-government policy, some 88 negotiation tables were operating in 2002.

The key question is what policy and legal responses are needed to address the needs and rights of people residing on reserve in opposite-sex conjugal relationships. A variety of viewpoints were expressed in the Focus Groups about whether there is any role for federal legislation in the area. Some First Nation women feel the matter should be addressed by First Nation law alone. Other women see an urgent need for laws that would provide basic legal remedies and emergency protection, such as interim orders for exclusive possession of the matrimonial home, and feel that some consideration must be given to federal legislation filling this gap, pending the adoption of First Nation laws under self-government or other processes. There is an equally strong view that amendments to the *Indian Act* could never produce a culturally appropriate response for the diverse First Nations affected and that new problems could be created by attempting to do so. And other women feel that new stand-alone federal legislation on the subject of matrimonial real property might be an option to consider. Overall, a careful examination and consideration of possible legislative responses was considered necessary to any formal consultation process, while recognizing the urgent need for remedies at the community level.

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[8] *Indian Act*, R.S.C. 1985, c. I-5, ss. 42-50.

[9] *First Nations Land Management Act*, S.C. 1999, c. 24.

It was noted in one of the Focus Groups that the process of consulting on, developing and adopting federal legislation can be lengthy (2 to 3 years at least). In the meantime, the needs of First Nation women for immediate protection and remedies remain. It was also noted that the undertaking of reforms must be transparent and clear. Timely information must be provided to people who have organized their affairs based on the existing state of the law (for example, through pre-nuptial or other agreements). Further, any new reforms or legislative initiatives should not disrupt existing negotiation processes. However, until self-government agreements or other arrangements are in place, the *Indian Act* land management regime continues to apply to the vast majority of *Indian Act* bands. Many participants in the Focus Groups felt that reform measures should respect the recognition of the inherent right of self-government of First Nations; strive to raise the interest and awareness of First Nation leadership in the issue; and provide new opportunities for First Nation lawmaking authority consistent with recognition of the inherent right of self-government.

The issue of matrimonial property rights on reserve is receiving increasing attention domestically and internationally by expert bodies concerned with human rights. First Nation women have been supported in their call for action by other organizations such as the National Association of Women and the Law (NAWL), the National Action Committee on the Status of Women, the Aboriginal Justice Inquiry of Manitoba and the United Nations Committee on Economic, Social and Cultural Rights.

The lack of remedies under federal law for married women on reserve that are typically available to married women off reserve under provincial law has been characterized by the National Association of Women and the Law as a violation of Article 26 of the International Covenant on Civil and Political Rights (which requires equality before the law and equal protection of the law).[10] First Nation women's organizations have also mobilized support from the National Action Committee on the Status of Women. In a 1998 Report, the United Nations Committee on Economic, Social and Cultural Rights (charged with monitoring compliance with the equality provisions of the International Covenant on Economic, Social and Cultural Rights) noted with concern Canada's failure to ensure equal protection of the law as between Aboriginal and non-Aboriginal women in respect to matrimonial real property: "The Committee notes that Aboriginal women living on reserves do not enjoy the same right, as women living off reserves, to an equal share of matrimonial property at the time of marriage breakdown."[11] In the Final Report of the Aboriginal Justice Inquiry of Manitoba (AJIM), the AJIM recommended that the *Indian Act* be amended to provide for the equal division of property on marriage breakdown.[12] In a Chapter devoted to Aboriginal women's issues, the AJIM stated the following conclusion:

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[10] National Association of Women and the Law, "The Civil and Political Rights of Canadian Women", On the Occasion of the Consideration of Canada's Fourth Report on the Implementation of the International Covenant on Civil and Political Rights, New York, March 26, 1999. See also, *2000 Alternative Report on Canada Toward Women's Equality: Canada's Failed Commitment*, Canadian Feminist Alliance for International Action, September 2000.

[11] UN. E/C.12/1/Add.31, 4 December 1998 at para 29.

> There is no equal division of property upon marriage breakdown recognized under the *Indian Act*. This has to be rectified. While we recognize that amending the *Indian Act* is not a high priority for either the federal government or the Aboriginal leadership of Canada, we do believe that this matter warrants immediate attention. The Act's failure to deal fairly and equitably with Aboriginal women is not only quite probably unconstitutional, but also appears to encourage administrative discrimination in the provision of housing and other services to Aboriginal women by the Department of Indian Affairs and local governments. [13]

How to apply the legal principle of "best interests of the child" in a First Nation context is another important issue. For example, the interests of children resident on reserve should be a significant factor in determining questions relating to possession of a matrimonial home; while taking account of the reality of family members (parents/guardians and children) with different legal statuses in regard to "Indian" status under the *Indian Act* and band membership. Also, the fact that many non-Indians and non-Band members lease reserve lands (where these are designated for such purposes) and live in various forms of conjugal relationships must be considered.

The Historical Context

A few words must be said about the larger historical and policy context in which the issues of matrimonial rights on reserve is situated.

Prior to European colonization efforts, many First Nation societies were matriarchal in nature. Missionaries and other Church officials discouraged matriarchal aspects of First Nation societies and encouraged the adoption of European norms of male dominance and control of women.[14] According to the customary law of the Mohawk nation for example, the matrimonial home and the things in it belong to the wife and women traditionally have exercised prominent roles in decision-making within the community.[15]

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[12] *Final Report of the Aboriginal Justice Inquiry of Manitoba*, Volume 1, Chapter 13 – Aboriginal Women, June 29, 2001. The Report can be found at the Website of the Aboriginal Justice Implementation Commission at http://www.ajic.mb.ca/volumel/chapter13.html

[13] *Ibid*.

[14] Teressa Nahanee, *Marriage As An Instrument of Oppression In Aboriginal Communities*, Keynote Address to the National Association of Women and the Law's 11th Biennial Conference 'Redefining Family Law: The Challenge of Diversity', St. John's Newfoundland, May 13, 1995.

[15] Martha Montour, "Iroquois Women's Rights with respect to matrimonial property on Indian Reserves" [1987] 4 *Canadian Native Law Reporter* 1; Robert A. Williams, "Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context" (1990) 4 *Georgia Law Review*. 1019.

With the establishment of Canada in 1867, federal Indian Affairs policy reflected a patriarchal bias in many areas. For example, federal legislation from 1869 to 1985 imposed patriarchal rules for determining Indian status, band membership and rights to reserve residency. On marriage to a man from another band, First Nation women were automatically transferred to their husband's band. Women were involuntarily "enfranchised" and separated from their communities and lands under such rules. For a long period of time First Nation women were forbidden to vote in band council elections among other legal disabilities.

That First Nation women bore the brunt of assimilative policies, implemented through the *Indian Act* status entitlement provisions and enfranchisement provisions, is clearly evident from the statistics: "Between 1955 and 1975 (when forced enfranchisement of women stopped), 1,576 men became enfranchised (along with 1,090 wives and children), while 8,537 women (as well as 1,974 of their children) were forcibly enfranchised and lost their status. From 1965 to 1975, only five per cent of enfranchisements were voluntary; 95 per cent were involuntary, and the great majority of these involved women."[16]

This gender-based discrimination took place in a larger context of Indian Affairs policy that sought to suppress First Nation cultural values and to assimilate First Nation people. The protection of the collective interest in reserve lands was a temporary protective measure pending the ultimate elimination of the need for reserves at all by assimilating the First Nation population. The assimilative purpose of certain sexually discriminatory Indian status and enfranchisement provisions is clearly evident in the historical record of the day and has been documented by many authorities. As just one example, is the following correspondence between the Deputy Superintendent General of Indian Affairs and the Superintendent General (the Minister of Indian Affairs) in 1920:

> When an Indian woman marries outside the band, whether a non-treaty Indian or a white man, it is in the interest of the Department, and in her interest as well, to sever her connection wholly with the reserve and the Indian mode of life, and the purpose of this section was to enable us to commute her financial interests. The words "with the consent of the band" have in many cases been effectual in preventing this severance....The amendment makes in the same direction as the proposed Enfranchisement Clauses, that is it takes away the power from unprogressive bands of preventing their members from advancing to full citizenship.[17]

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[16] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.4, Chapter 2, RCAP CD ROM, Seven Generations, Record 19116) citing Kathleen Jamieson, *Indian Women and the Law: Citizens Minus (Ottawa: Supply and Services, 1978).*

[17] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.4, Chapter 2, RCAP CD ROM, Seven Generations, Record 19104) citing Letter from Deputy Superintendent General Scott to Arthur Meighen Superintendent General of Indian Affairs, (12 January 1920) reprinted in NAC RG10, Vol 6810, file 470-2-3, vol. 7. Other sources include Kathleen Jamieson,

One of the aims of the first consolidated Indian Act (*Indian Act, 1876*) was to encourage individual property rights and landholding on reserves.[18] The location tickets that are grandfathered by s. 20(3) for example, were a means of introducing European concepts of individual property ownership and encouraging the assimilation of individuals holding them.[19] Location tickets granted exclusive rights of occupancy and possession (but not ownership) of particular plots of reserve land. Today's Certificate of Possession system eventually replaced location tickets. But, as Daugherty and Madill note, an essential condition of enfranchisement and of the "civilization" policies of the day was the granting of a portion of the reserve in fee simple.[20] Thus for a period of time, "enfranchised" Indians left the reserve, forfeited their legal status as "Indians" and took a portion of the reserve with them. It appears however that the women who were forcibly enfranchised were provided a portion of annuities from band funds but not land.[21]

Some First Nations dealt with the threat of assimilation (including threats to the reserve base through enfranchisement and federal policies of individual allotment) by refusing to make allotments to individuals or to cooperate with the federal system of registering such allotments. For a period of time, the federal government responded by removing the band council's power to make individual allotments and placing it with the Superintendent General of Indian Affairs (the Minister).[22]

Indian Women and the Law: Citizens Minus (Ottawa: Supply and Services, 1978); John Leslie and Ron Maguire, *The Historical Development of the Indian Act* (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Center, 1978); John L. Tobias, Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy, (1976) 6 *Western Canadian Journal of Anthropology* 13; John Giokas, *The Indian Act: Evolution, Overview and Options for Amendment and Transition*, Research Paper prepared for the Royal Commission on Aboriginal Peoples.

[18] Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation 1868-1951*, (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Center, 1980) at pages 4-5.

[19] John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in J.R. Miller, ed. *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), page 127 at page 132.

[20] Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation 1868-1951*, (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Center, 1980) at pages 4-5.

[21] Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation 1868-1951*, (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Center, 1980) at pages 4-5.

[22] John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in J.R. Miller, ed. *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), page 127 at page 135.

With respect to individual land allotments on reserve, there has been a bias in favour of males receiving certificates of possession for the family home. The Royal Commission on Aboriginal Peoples concluded:

> There is no prohibition against women owning property through a certificate of possession. But the cumulative effect of a history of legislation that has excluded women and denied them property and inheritance rights, together with the sexist language embedded in the legislation before the 1985 amendments, has created a perception that women are not entitled to hold a CP [Certificate of Possession].[23]

All of these legal barriers to equality, and intrusions into fundamental questions affecting First Nation women's identities, interfered with traditional roles of women in governance, their relationship to traditional territories and their role as conveyors of cultural values and traditions.

The 1985 amendments to the *Indian Act*[24] were intended to remove the worst aspects of sex-based discrimination in the Act's Indian status and band membership provisions. However, on reinstatement under the 1985 amendments to the *Indian Act*, many women have reported difficulty in acquiring housing on-reserve and establishing residency on reserve in their own right.

The combined impact of colonialism on the landholding traditions of First Nations and on gender relations has been severe and negative. The *Indian Act* land regime interfered with the pre-contact gender relations and power relations between women and men as well as indigenous values in relation to land and individual and collective rights in relation to land.[25] This is especially the case in regard to First Nation women's rights to reside and hold individual interests in reserve land, whether single, married, separated or divorced. Contemporary matrimonial property issues on reserve thus occur against a long and fairly consistent historical pattern of disenfranchisement, by which First Nation women have been separated from reserve communities and their gender equality interests in reserve lands ignored.[26]

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[23] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.4, Chapter 2, RCAP CD ROM, Seven Generations, Record 26161)

[24] *An Act to amend the Indian Act*, S.C. 1985, c. 27.

[25] See for example, Kathleen Jamieson, *Indian Women and the Law: Citizens Minus* (Ottawa: Supply and Services, 1978); Martha Montour, "Iroquois Women's Rights with respect to matrimonial property on Indian Reserves" [1987] 4 *Canadian Native Law Reporter* 1; Mary Ellen Turpel "Home/Land" in (1991) *18 Canadian Journal of Family Law* 17; Robert A. Williams, "Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context" (1990) 4 *Georgia Law R*eview 1019.

[26] The larger pattern of historic and continuing discrimination experienced by First Nation women has been well documented. See for example, Joanne Fiske, "Political Status of Native Indian Women: Contradictory Implications of Canadian State Policy" (1995) 19 *American Journal of Culture and Research* 1. Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on

Matrimonial property rights off reserve are governed exclusively by provincial law. These have undergone considerable change and continue to evolve with contemporary notions of gender equality and evolving notions of family in Canadian society. The notion of equal division of matrimonial property now reflected in provincial and territorial laws of general application emerged in the 1970's. The rights of common law couples and same-sex couples relative to those married under provincial law is currently undergoing considerable discussion and change, as courts and legislatures consider and deal with the impact of the *Charter* on these issues. Addressing issues of family violence through specific legislation is another recent development in provincial and territorial family law.

On reserve, the *Indian Act* today remains silent on the subject of matrimonial real property, the *First Nations Land Management Act* addresses it explicitly and existing self-government agreements generally do not mention the subject.

The Constitutional Context

Under sections 91 and 92 of the *Constitution Act, 1867*, jurisdiction over family law matters is divided between the federal and provincial governments. In addition to the federal-provincial division of powers, the division of lawmaking authority as between First Nations who might exercise an inherent lawmaking authority under s. 35 of the *Constitution Act, 1982* and the federal government pursuant to its jurisdiction under the *Constitution Act, 1867* must be considered, along with the Crown's fiduciary duties in respect to aboriginal and treaty rights. Many First Nation advocates argue that any legislative responses to address issues in First Nation communities must flow from First Nation jurisdiction under s. 35, rather than using federal legislative jurisdiction under s. 91(24).

The bulk of family law falls under provincial lawmaking power as a result of provincial jurisdiction over "Property and Civil Rights in the Province" under section 92(13) of the *Constitution Act, 1867*. This power encompasses property and contract law as well as matrimonial property issues, spousal and child support, adoption, guardianship, custody, legitimacy, affiliation and names.[27] Provincial legislatures also have powers to make laws in relation to the "Solemnization of Marriage in the Province" under section 92(12). Another important head of provincial power (in relation to enforcement of rights to matrimonial property) is the "Administration of Justice in the Province" under section

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the Status of Women, Ministry of Supply & Service Canada, 1978); Sharon McIvor, The Indian Act As Patriarchal Control Of Women" (1994) 1 *Aboriginal Women's Law Journal* 41; Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nation women" in *Women and the Canadian State* (Montreal & Kingston: McGill-Queen's University Press, 1997) at 64.; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 4 Perspectives & Realities, Chapter 2, Women's Perspectives; Sally Weaver, "First Nation women and Government Policy, 1970-92: Discrimination and Conflict" in *Changing Patterns*, eds. Sandra Burt, Lorraine Code & Lindsay Dorney (Toronto: McClelland & Stewart, 1993).

[27] Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed., (Toronto: The Carswell Company Limited, 1985).

92(14).

Federal lawmaking power includes authority over "Marriage and Divorce" under s. 91(26) as well as "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. Federal powers over divorce include corollary relief in the form of alimony and child maintenance and custody orders but are considered not to include the power to order transfer of real estate or other specific assets.[28] Provincial laws may also provide for alimony, maintenance and custody. There is a possibility of conflict between orders made under provincial law and orders made under the *Divorce Act*[29]. In the view of one leading authority, any conflicts in this area should be resolved in favour of the federal legislation by reason of the doctrine of federal paramountcy.[30]

Section 91(24) of the *Constitution Act, 1867* grants the federal Parliament, jurisdiction in relation to "Indians, and Lands reserved for the Indians". Section 91(24) consists of two heads of power: " The first power may be exercised in respect of Indians (and only Indians) whether or not they reside on, or have any connection with, lands reserved for the Indians. The second power may be exercised in respect of Indians and non-Indians so long as the law is related to lands reserved for the Indians."[31]

Federal jurisdiction in relation to "Indians" includes jurisdiction over matters that would otherwise fall under provincial jurisdiction. This would explain the validity of federal *Indian Act* provisions respecting wills and estates and to provisions addressing measures for "mentally incompetent Indians" whether on or off reserve. How far the subject-matter jurisdiction of section 91(24) extends into areas that are normally provincial is still a matter of debate. Hogg has suggested that it is likely that courts would uphold laws, which could be "rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence". In this regard, laws in regard to Indian property have traditionally been part of federal Indian policy.[32] There would seem to be no doubt that the federal Parliament has legislative jurisdiction in regard to matrimonial real property issues on reserve despite the fact that federal power on the subject off reserve is limited to corollary powers related to divorce. The Supreme Court of Canada decision in *A.G. of Canada* v. *Canard* held that the wills and estates provisions of the *Indian Act* are a valid exercise of federal jurisdiction under s. 91(24), and that this jurisdiction includes the property and civil rights of Indians.[33]

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[28] *Ibid* at p. 540.

[29] *Divorce Act*, R.S.C. 1985, (2d Supp.), c. 3.

[30] *Supra*, note 28 at p. 541.

[31] *Supra*, note 28 at p. 552.

[32] *Supra*, note 28 at p. 554

[33] *A.G. of Canada* v. *Canard* [1976] 1 S.C.R. 170 (S.C.C.).

Section 91(24) therefore would appear to allow federal legislation applicable on reserve to provide remedies on separation or divorce such as interim possession of the matrimonial home or forced sale of the right to occupy. While rights of ownership to reserve land cannot be created under the *Indian Act*, (nor can reserve land be transferred or sold except to the federal Crown on surrender by the band) individual rights of possession in relation to parts of reserve land can be transferred or sold among band members. Individual band members can own homes or other buildings on reserve.

The Report of the Royal Commission on Aboriginal Peoples (RCAP) recognizes existing inherent powers of Aboriginal peoples as an aspect of a right to self-determination within Canada, and as a constitutional right protected by s. 35 of the *Constitution Act, 1982*. The RCAP analysis includes jurisdiction over marriage and property rights in respect to First Nations lands (such as *Indian Act* reserve lands) as part of the core area of First Nation inherent jurisdiction that can be exercised without negotiation of agreements or other forms of recognition by federal or provincial governments.[34] (The recommendations of the RCAP are reviewed in a later section of this paper.)

As a matter of government policy,[35] the federal government recognizes the existence of an inherent right of self-government within the meaning of s. 35 of the *Constitution Act, 1982*. The Aboriginal Self-Government policy adopted by the federal government in 1995 includes lawmaking authority over “marriage” and over property rights on reserve among subjects that can be discussed as part of a self-government agreement.[36] "Divorce" is identified (in the same policy document) as an area that would remain primarily with the federal government, but where the federal government is willing to negotiate some measure of Aboriginal jurisdiction. A willingness to discuss a subject as a matter for negotiation in a self-government agreement does not, from the federal perspective, involve acknowledgement of any existing inherent power by any First Nation.

The B.C. Supreme Court in the *Campbell*[37] decision has recognized an existing inherent aboriginal right of self-government that is constitutionally protected by s. 35 of the *Constitution Act, 1982*. The Court relied in part on common law decisions recognizing Aboriginal customary law over marriage for this finding. The decision was not appealed. The issue of whether an inherent right of self-government is included within the protection of s. 35 has not been directly addressed yet by the Supreme Court of Canada.

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[34] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.5 - Renewal: A Twenty-Year Commitment, Appendix A: Summary of Recommendations Vols. 1-5, CD ROM Record 26161)

[35] Canada, *Aboriginal Self-Government* (Ottawa: Indian Affairs and Northern Development, 1995).

[36] Canada, *Aboriginal Self-Government* (Ottawa: Indian Affairs and Northern Development, 1995).

[37] *Campbell* v. *Attorney-General (British Columbia)* [2000] B.C.J. No. 1524 (B.C.S.C.).

Notions of Equality and Gender Equality

For the Government of Canada, gender equality is a key policy value expected to guide the development of all federal policy and legislation.[38] The goals of gender equality analysis in a federal context are considered broader than the legal equality guarantees in the *Charter*[39] and in s. 35(4) of the *Constitution Act, 1982*[40]. The Department of Justice states in its guide to gender equality analysis:

> *Charter* analysis assesses whether the effects of a law or proposed law on women might violate the equality guarantees of the *Charter*, as they are currently defined and applied by the courts. The analysis determines whether the effects of a particular law meet the legal test of discrimination.
>
> In contrast, gender equality analysis seeks to identify and address adverse impacts that laws, policies and programs have on diverse groups of women – whether or not they amount to discrimination in law. The goal of the analysis is to shape laws, programs and policies that are more effective, durable and fair.[41]

The Indian and Northern Affairs Canada publication, *Gender Equality Analysis Policy*, explains several terms relevant to gender equality analysis.[42] The term "sex" is explained as identifying the biological differences between women and men, while "gender" is used to refer to the culturally specific set of characteristics that identifies the social behaviours of women and men, and the relationship between them. The publication states that:

> Gender, therefore, refers not simply to women or men, but also to the relationship between them and the way it is socially constructed. It is a

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[38] Indian and Northern Affairs Canada, *Gender Equality Analysis Policy* (1999); Justice Canada, *Diversity and Justice: Gender Perspectives (A Guide to Gender Equality Analysis)*, (1998); Status of Women Canada, *Federal Plan for Gender Equality* (1995).

[39] *Constitution Act, 1982*, Schedule B, *Canada Act 1982* (U.K.) 1982, c. 11, ss. 15, 28. These provisions must be read with s. 25 which provides that Charter guarantees shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.

[40] *Constitution Act, 1982*, Schedule B, *Canada Act 1982* (U.K.) 1982, c. 11, s. 35(4) guarantees existing Aboriginal and treaty rights equally to male and female persons notwithstanding any other provision of the Act.

[41] Canada (Department of Justice), *Diversity and Justice: Gender Perspectives A Guide to Gender Equality Analysis*. A copy can be found on the Department of Justice Website at http://canada.justice.gc.ca/en/dept/pub/guide/intro.htm

[42] Indian and Northern Affairs Canada, *Gender Equality Analysis Policy* (1999) at p.6.

> relational term that, by definition, includes women and men. Like the concepts of class, race and ethnicity, gender is an analytical tool for understanding social processes.[43]

"Gender equity" is defined as the process of achieving fairness among women and men while the term "gender equality" speaks to equality in status and equal enjoyment of fundamental human rights:

> "Gender equality" means women and men enjoying the same status.
> Gender equality means that women and men have equal conditions for realizing their full human rights and potential to contribute to national, political, economic, social and cultural development, and to benefit from the results.
> Gender equality is therefore the equal valuing by society of both the similarities and differences between women and men, and the varying roles that they play.[44]

While some First Nation people expect *Charter* equality values to be fully applied to First Nation communities and also endorse notions of gender equality, others have identified problems in applying the *Charter* and notions of gender equality from the larger Canadian society to a First Nation context.

First of all, conventional western rights analyses, including equality rights analysis, involve labelling rights, interests and people, thereby breaking down the collective into what are perceived to be "different" constituent parts. This labelling process is regarded by some leading First Nation scholars as necessarily polarizing or as aggravating the divisions and "differences" created by the colonization process.[45] If one accepts this analysis, proposed remedies for addressing gender inequality in an *Indian Act* context must also promote social cohesion and conflict resolution. In any event, this issue demonstrates the need to engage First Nation communities in discussions about their conception of rights and the role rights play or should play in their communities. These concerns underline the fact that matrimonial real property is not "just" a women's issue. It affects the entire community - while having a critical impact on the place of First Nation women in their communities.

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[43] *Ibid.*

[44] *Ibid.*

[45] See for example, James [sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996), 23 *Manitoba Law Journal* 1; Patricia A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992), 56 *Saskatchewan Law Review* 237; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nation women" (1993) 6 *Canadian Journal of Women and the Law* 174.

Secondly, some First Nation women (and men) are concerned that the application of *Charter* equality values and notions of gender equality will lead to sameness of treatment as between women and men despite judicial statements[46] and federal policy statements to the contrary, such as the following:

> The substantive approach to equality adopted by Canadian courts recognizes that treating individuals with different needs, resources and life circumstances in exactly the same way may perpetuate inequality. Instead, ensuring equal benefit of the law requires that our laws and policies respond appropriately and fairly to differences in personal characteristics, socio-economic circumstances, and life situations in order to achieve greater equality in social outcomes.[47]

Some First Nation women feel that courts still do not sufficiently take account of such contextual factors, much less reflect an understanding of First Nation cultural contexts.[48] Some participants in the Focus Groups questioned whether mainstream equality analysis and gender equality analysis can assist First Nation women striving to reassert their traditional roles and place in First Nation communities, such as the strong and central role of women in matriarchal societies. Some First Nation women insist that in dealing with *Charter* equality guarantees, section 25 of the *Charter* must be taken into account to protect aboriginal, treaty and other rights and freedoms of First Nations.[49] In this view, First Nation perspectives on the roles and responsibilities of individuals and the relationship of individuals to the community should form part of such an analysis.

A different view held equally strongly by other First Nations women is that women can only be assured of re-asserting their rightful place in First Nation communities, if *Charter* equality values are applied to all legislation whether federal or First Nation in source.

In *Campbell* v. *British Columbia (Attorney General)*, Mr. Justice Williamson commented on the relationship between *Charter* rights and aboriginal rights in considering the function of section 25 of the *Constitution Act, 1982*:

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[46] "It must be recognised at once...that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality." Per McIntyre, J. in *Andrews v. Law Society of British Columbia*, [1989] 1 *Canada Supreme Court Reports* 143, at 164.

[47] Justice Canada, *Diversity and Justice: Gender Perspectives (A Guide to Gender Equality Analysis)*, (1998).

[48] Mary Ellen Turpel , "Home/Land" in (1991) 18 *Canadian Journal of Family Law* 17; Vina Starr, "The Charter and Aboriginal Rights" in *The Charter: Ten Years Later*, Proceedings of the April 1992 Colloquium of the Canadian Bar Association and the Department of Justice of Canada (Cowansville, Quebec: Les Editions Yvon Blais, 1992) 153.

[49] Section 25 of the *Constitution Act, 1982* provides, in part: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada…"

> In construing this section, one must keep in mind that the communal nature of aboriginal rights is on the face of it at odds with the European/North American concept of individual rights articulated in the *Charter*.[50]

Mr. Justice Williamson concluded that the small amount of case law on the point suggests that section 25 functions as a "shield" protecting aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*.[51] It must be noted however, that the court in *Campbell* was not faced with issues of sex or gender-based discrimination. Accordingly, the court did not address the question of how sections 28[52] and section 25 of the *Charter* together are to be interpreted in a case of alleged sex discrimination in a First Nation context.

The Supreme Court of Canada has not yet made any binding comments on the meaning of section 25. In *Corbiere*[53], the majority of the Court held with respect to section 25 that no case had been made for the application of s. 25 of the *Charter* in that particular case and accordingly, that it would be inappropriate for the Court to articulate general principles pertaining to s. 25 (at paragraphs 20 and 53). Nevertheless, the minority judgment of Mme. Justice L'Heureux-Dubé (in which Gonthier, Iacobucci and Binnie JJ. agreed) did make the following general comments about section 25:

> ...the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. Because it has not been shown to apply, and argument on this question was extremely limited, it would be inappropriate to articulate, in this case, a general approach to s. 25. In particular, I will not decide how the words "shall not be construed so as to abrogate or derogate" affect the analysis under other *Charter* provisions when the section is triggered, or whether s. 25 "shields" the rights it includes from the application of the *Charter*. I also find it unnecessary to decide the scope of the "other rights or freedoms" protected by the section. These questions will be determined when the issues directly arise and the Court has heard full argument on them. I emphasize, however, that as I will discuss below, the contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect

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[50] *Campbell* v. *Attorney-General (British Columbia)*[2000] *British Columbia Judgments* No. 1524 (B.C.S.C.) at paragraph 155.

[51] *Campbell* v. *Attorney-General (British Columbia)*[2000] *British Columbia Judgments* No. 1524 (B.C.S.C.) at paragraph 156.

[52] Section 28 of the *Constitution Act, 1982* provides: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

[53] *Corbiere* v. *Canada*, [1999] 2 *Canada Supreme Court Reports*, 203 (S.C.C.).

> for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history.[54] (emphasis added).

While the meaning and scope of section 25 of the *Constitution Act, 1982* is beyond the scope of this paper; these issues are clearly relevant to resolving the debate on how equality guarantees should be applied to First Nation communities. First Nation women, whatever perspective they adopt in this debate, have questions and concerns about how section 25 of the *Charter* together with sections 15 and 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982* factor into the federal government's notions of gender equality as a matter of law and in federal gender equality analysis in general.

It is clear from judicial decisions and federal policy statements that *Charter* equality analysis and gender equality analysis are supposed to take into account relevant contextual factors such the existence of multiple or compounded forms of discrimination and social inequality. This approach recognizes that First Nation women can experience several forms of discrimination or social inequality at the same time (e.g. involving aspects such as race, gender, culture, poverty or marital status among other possible examples). The *Canadian Human Rights Act* recognizes that a discriminatory practice can include a practice based on more than one ground of discrimination or the effect of a combination of prohibited grounds.[55] How such analyses of compound discrimination are to be conducted is less clear. It is a relatively untouched area of judicial decision and federal policy analysis in a First Nation context.[56]

In the context of matrimonial real property issues on reserve, such an analysis would recognize how First Nation women historically have experienced racism and sexism and other forms of discrimination as a result of the *Indian Act*. For example the imposition of non-Aboriginal concepts of private or individual property rights combined with numerous forms of patriarchal bias have led to First Nation men being the primary holders of Certificates of Possession on reserve. This in turn contributed to the displacement of many First Nation women from their traditional roles as women, negatively affected their gender relations with men and the relationship of First Nation women to First Nation land. With respect to matrimonial real property, the collective impacts of colonialism (e.g. the displacement or suppression of First Nation cultural values combined with gender bias) have resulted in many women finding themselves in a disadvantageous legal position when their marriage or common law relationship breaks down.

Gender equality analysis in a context that takes account of other equality issues facing First Nations women, may mean that gender equality in respect of matrimonial real property cannot be effectively or meaningfully addressed without simultaneously analyzing and addressing how the *Indian Act* and other federal legislation may perpetuate the suppression of First Nation cultural values in relation to land and families.

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[54] *Corbiere* v. *Canada*, [1999] 2 *Canada Supreme Court Reports*, 203 (S.C.C.), at paragraphs 52-54.

[55] *Canadian Human Rights Act*, R.S.C. 1985, C. H-6, s. 3.1.

[56] *Rivers* v. *Squamish Indian Band* [1994] CHRD No. 3, is an example of a case where the B.C. Human Rights Tribunal recognized a case of compound discrimination in a First Nation community.

A comprehensive gender equality analysis must also recognize that First Nation women can be negatively affected in regard to matrimonial real property issues by the net effect of the *Indian Act*, and decision-making at the First Nation community level by band councils over matters such as band membership. Some women seeking to reclaim membership in the band they were born into (after the breakdown of their marriage to a man of another band) have lost membership in both bands, with a resulting loss of rights with respect to attaining or retaining land allotments on the reserves of either band. The facts in *George* v. *George* as described by Justice Coultas of the B.C. Supreme Court clearly describe such a case:

> Mrs. George was born into the Squamish Indian Band. Her husband is a member of the Burrard Indian Band. When they married, by the terms of the Indian Act of that day, Mrs. George was compelled to relinquish her membership in her own band and to become a member of her husband's band. At the moment she is a "stateless person," for after divorce she applied to rejoin the Squamish Band. Her application has not yet been considered by the chief and council. By applying, she has lost her membership in the Burrard Band.[57]

There is a growing understanding that gender and race issues impact on the socio-economic well-being of First Nation women "as individuals, as mothers, and as members of their communities".[58] Further, First Nation women have made clear that "the sexual discrimination that women face on a day-to-day basis cannot be separated from the twin legacies of colonialism and racism, which continue to marginalize Aboriginal peoples and devalue their cultures and traditions."[59]

Crown and First Nation Roles in Reserve Land Management

Under the Canadian legal system, legal title to Indian reserve land is held by the federal Crown for the use and benefit of specific First Nations through the "Bands" recognized under the *Indian Act*.[60] Section 29 of the *Indian Act* protects reserve lands from seizure under legal process.

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[57] *George* v. *George* [1993] 2 *Canadian Native Law Reporter* 112 (B.C.S.C.) aff'd, [1997] 2 *Canadian Native Law Reporter* 62; (1996), 24 *Reports of Family Law* (4th) 155; 139 *Dominion Law Reports* (4th) 53; 81 B.C.A.C. 62; 132 W.A.C. 63 (B.C.C.A.); additional reasons at (1997), 30 *British Columbia Law Reports* (3D) 107; 27 *Reports of Family Law* (4th) 81; 91 B.C.A.C. 163; 148 W.A.C. 163 (B.C.C.A.).

[58] Sandra Elgersma et al., *Aboriginal Single Mothers In Canada, 1996: A Statistical Profile*, Indian Affairs and Northern Development, Introduction.

[59] Status of Women Canada, *Aboriginal Women's Roundtable On Gender Equality*, March 30-April 1, 2000, p.4.

The nature of First Nations' interest in reserve lands has been described as follows by the Supreme Court of Canada in the *Guerin* case:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[61]

Historically, the Department of Indian Affairs and Northern Development has been legally responsible for the administration and management of reserve land for the benefit of First Nations. Exceptions to this general rule are First Nations who have negotiated self-government or land rights agreements addressing land management and the 14 First Nations who negotiated a Framework Agreement that led to the adoption of the federal *First Nations Land Management Act (FNLMA)*. While the vast majority of First Nations in Canada are still subject to the land management regime of the *Indian Act*, there is a strong interest in the *FNLMA* and many more *Indian Act* bands may opt in to its provisions in the future. Under the *FNLMA*, First Nations are required to adopt comprehensive land codes, including matrimonial real property laws. On adoption of a valid land code, the new First Nation land regime displaces that of the *Indian Act*.

Under section 60 of the *Indian Act*, the Governor-in-Council may grant (where the band requests) a band the right to exercise such control and management over lands in the reserve as the Governor-in-Council considers desirable. This delegated power allows bands to approve allotments and other transactions among band members and to sign leases and other agreements on the Minister's behalf. Under s. 81(1)(l) of the *Indian Act*, bands have authority to make by-laws on the survey and allotment of reserve lands for both common and individual use of band members to the extent granted under s. 60.

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[60] Section 18 provides that reserves are held by Her Majesty for the use and benefit of the respective bands for which they are set apart. Subject to the Act and the terms of any treaty, the Governor in Council may determine whether any purpose for which any lands in a reserve are used or are to be used, is for the use and benefit of the Band. And see definition of "reserve" in section 2 of the Act.

[61] *Guerin* v. *R.*, [1984] 2 *Canada Supreme Court Reports* 335 at p. 382.

A decision in British Columbia, *Dunstan* v. *Dunstan*[62] suggests that the distinction between unsurrendered reserve lands and designated reserve lands may be important with respect to the application of provincial family law to leasehold interests in designated lands (discussed below in more detail).

Designated lands are defined in s. 2 of the *Indian Act*. In more general terms, the nature of designated land has been explained as follows:

> This refers to land, which has been set aside by a First Nation for a specified use and period of time, following the designation process including acceptance by the Governor in Council (e.g. industrial parks, long term lease, urban development). Designated lands retain reserve status for many purposes under the Act, but there are a number of important exclusions. The exclusions are intended to ensure that specific transactions do not occur on designated land, such as those related to allotments under s. 20 to s. 25…. Due to concerns about possible reversion of underlying title to province, designations are not done in Quebec.[63]

Band councils have regulatory and taxing powers over designated lands that have been leased by the band for development purposes. Leasehold interests in designated lands are mortgageable as an exception to the general rule in section 89 that reserve lands cannot be mortgaged (section 89(1.1)).

Individual Rights to Occupation and Use of Reserve Land by Band Members

Under the *Indian Act* land regime, there is no individual fee simple ownership of reserve land. There is a system of allotment of individual rights of possession of specific sections of reserve land. "Allotment" is the term used to refer to the granting of the right to use and occupy reserve land to a member of a First Nation by the council of the First Nation.[64]

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[62] *Dunstan* v. *Dunstan*, (2002) 100 *British Columbia Law Reports* (3d) 156 (B.C.S.C., In Chambers).

[63] Indian and Northern Affairs Canada. 1999. "Understanding the Regulatory Environment for On-Reserve Lending", May 1999 at pages 3-4.

[64] Indian and Northern Affairs Canada. 1999. "Understanding the Regulatory Environment for On-Reserve Lending", May 1999 at page 1.

Under s. 20, band councils have a power of allotment of land in a reserve – subject to Ministerial approval. Subsection 20(1) provides that no Indian is lawfully in possession of land in a reserve unless, possession has been allotted by the band council with approval of the Minister of Indian Affairs. The land allotment provisions of the *Indian Act* do not apply to designated lands (s. 2 definition of "reserve").

The *Indian Act* requires that allotments of reserve land to band members be authorized by the band council and be approved by the Minister of Indian Affairs, or by the band council on the Minister's behalf when this authority has been delegated as mentioned above: "…there is no statutory provision enabling the individual band members alone to exercise through possession the right of use and benefit which is held in common for all band members."[65]

The band council power of allotment must conform with the requirements of s. 2(3)(b) for the exercise of band council powers conferred on band councils – that is, it must be exercised pursuant to the consent of a majority of the councillors of the band present at a duly convened meeting of council.[66] Although band council resolutions ("BCRs") are not referred to in the *Indian Act*, allotments are typically made by BCR.

Pursuant to subsection 20(3), individuals possessing valid location tickets on 4 September 1951 are deemed to possess Certificates of Possession. Where Ministerial approval is withheld for a Certificate of Possession, a Certificate of Occupation can be issued for a period of two years with a power of renewal residing in the Minister.[67]

Sections 24 and 25 provide for the transfer of a reserve land allotment from one band member to another, or the band itself. Section 24 of the *Indian Act* provides that an Indian in lawful possession of lands in a reserve may transfer the right to possession of such lands to the band or another member of the band.[68] Section 25 provides that six months after an Indian ceases to be entitled to reside on reserve, he or she may transfer to the band or another member of the band, the right to possession of any lands in the reserve of which he or she has lawful possession. In the absence of a matrimonial real property regime on reserve, these provisions empower a married spouse or common law partner to transfer his or her interest without the consent of the other, even where both are band members.

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[65] *Joe* v. *Findlay* [1981] 3 W.W.R. 60, 26 *British Columbia Law Reports* 376, 122 *Dominion Law Reports* (3d) 377 at 380 (B.C.S.C.).

[66] *Leonard* v. *Gottfriedson* (1980), 21 *British Columbia Law Reports* 326, [1982] 1 *Canadian Native Law Reporter* 60 (B.C.S.C.).

[67] *Indian Act*, R.S.C. 1985, c. I-5, s. (20(4) and 20(5).

[68] The section also provides that no transfer or agreement for the transfer of the right of possession is effective until it is approved by the Minister.

Under section 27, a Certificate of Possession or a Certificate of Occupation can only be corrected or cancelled where the certificate was issued to the wrong person, or in the wrong name; contains any clerical error or misnomer; or contains the wrong description of any material fact. This section underlines the fact that under the current state of the law, there is no authority for a court or other decision-making body such as band council, to transfer possession of a portion of reserve land for reasons related to family law considerations such as breakdown of a marriage or a relationship.

A statutory exception to this general rule is provided by s. 22 of the *Indian Act*, where a member of the Band was already in possession of land on which he or she has made improvements, and which later becomes part of the reserve. In *Stoney Band* v. *Poucette*, the Alberta Court of Appeal held that a Certificate of Possession was not necessary in such a case to establish lawful possession.[69]

An individual allotment may be made to more than one person, either through a tenancy in common or a joint tenancy. In the event of the death of one of the tenants in common, his or her share of land can pass to heirs of the estate. In a joint tenancy, the surviving tenant or tenants become entitled to the share of the deceased. However, joint tenancy is not recognized in Quebec.

In a matrimonial case, *George* v. *George*, the B.C. Court of Appeal held that it could make a compensation order under the provincial *Family Law Relations Act* in favour of the wife, based on the value of the matrimonial home then occupied by the husband on reserve.[70] The Court rejected the husband's argument that he was not legally in possession of the matrimonial home because there was no Certificate of Possession issued to him. The Court inferred approval by the band council and the Department of Indian Affairs of the husband's possession from a course of conduct by both entities. A decision of the B.C. Supreme Court, *Lower Nicola Indian Band* v. *Trans-Canada Displays Ltd.*, held that in exercising its power of allotment under subsection 20(1), a band council holds a fiduciary obligation to all band members and must consider the rights of other band members. In this case, a band member in possession of 80 acres of reserve land had claimed possession based on traditional or customary use, and had entered into an agreement with a company to display billboards on that land. After his death, his estate claimed the land. The case involved a not uncommon fact situation of land transactions made by different individuals in regard to the same plot of reserve land. One party traced possession from someone who had been granted a certificate of possession at one time. The other party claimed possession based on inheritance from their father who claimed a traditional or customary use of the land. The court held that traditional or customary use did not create a legal interest in the land that would conflict with the provisions of the *Indian Act*; and that until a Certificate of Possession was issued to the estate or a Ministerial permit granted under s. 28, the company displaying billboards would be trespassing on reserve lands. The band council was willing to consider granting a Certificate of Possession for part of the land. The court found that the band council's power to make allotments to individual band members must be exercised in accordance with the council's fiduciary duty to all band members, which required balancing the band's collective interests with the interests of the individual seeking an allotment. The court also held that a band council in making a decision on allotment must meet the requirements of procedural fairness (such as making a decision fairly and in good faith and providing applicants an opportunity to submit evidence and to be heard).[71]

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[69] *Stoney Band* v. *Poucette* (1996) [1999] 3 *Canadian Native Law Reporter* 321 (Alta Q.B.); affirmed July 17, 1998, Doc. Calgary Appeal 17374 (Alta. C.A.).

[70] *George* v. *George* (1996), [1997] 2 *Canadian Native Law Reporter* 62, 24 *Reports of Family Law* (4th) 155, 139 D.L.R. (4th) 53, 81 B.C.A.C. 62, 132 W.A.C. 63 (B.C.C.A.); additional reasons at (1997), 30 *British Columbia Law Reports* (3D) 107, 27 *Reports of Family Law* (4th) 81, 91 B.C.A.C. 163, 148 W.A.C. 163 (B.C.C.A.).

The Court in *Lower Nicola Indian Band* noted that the focus of the *Indian Act* is protection of reserve land for the benefit of bands and quoted Mr. Justice Judson speaking for the majority in a 1965 decision of the Supreme Court of Canada: "The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act."[72]

The Court in *Lower Nicola Indian Band* also took note of the explanation provided in *Joe* v. *Findlay*[73] regarding the relationship between the band's common interest in all reserve lands, and those held by individual band members by allotment. In that case, the B.C. Supreme Court stated that: " The right of the entire band in common may be exercised for the use and benefit of an individual member of the band by the band council, with the approval of the Minister, allotting to such individual member the right to possession of a given parcel of reserve lands: see Indian Act, s. 20." In *Joe* v. *Findlay*, a member of the band was found to be in trespass after taking possession of a portion of reserve land, clearing a lot and putting a mobile home on it without band council approval.

The characterization of band council decision making authority in this situation as fiduciary in nature, and as such, encompassing a duty to take into account the collective interests and the rights of other band members could be quite significant. It could be applied to a wide range of fact situations, including matrimonial property concerns. First Nations operating under the *Indian Act* alone, and wishing to address matrimonial real property issues in an interim way (pending opportunities to complete self-government discussions or to come under the *First Nations Land Management Act)* could adopt policies to govern the granting of allocations of land that take into account matrimonial real property considerations. Some band councils already have adopted policies that allotments are to be made to husband and wife jointly, where the applicant is married. Where required, these policies could be further developed, by requiring all individuals to state as part of their application for an allotment of reserve land, whether they are married or living in a common law relationship; and granting reserve land allotments to couples who are married or living common law subject to certain conditions. For example, an allotment could be made subject to reconsideration by the band council as to the respective interests of the couple, should the relationship end; and stating the principles to be applied to determine the interests of the parties. A disadvantage to this approach is uncertainty about the legality of a conditional allotment under the Act as it currently stands; and the fact that such policies could probably not be applied retroactively to Certificates of Possession already granted.

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[71] *Lower Nicola Indian Band* v. *Trans-Canada Displays Ltd.*, [2000] 4 *Canadian Native Law Reporter* 185, 2000 BCSC 1209 (B.C.S.C.). See also *Campbell* v. *Elliott* [1988] 4 *Canadian Native Law Reporter* 45 (F.C.T.D.) which the court in *Lower Indian Nicola Band* distinguished on its facts but relied on its reasoning that a band council must make a decision on allotments in a way that reflects procedural fairness and must balance the collective and individual interests of band members in making decisions on allotments.

[72] *The Queen* v. *Devereux* (1965), 51 *Dominion Law Reports* (2d) 546 at 550 (S.C.C.) as quoted in *Lower Nicola Indian Band* at paragraph 121.

[73] *Joe* v. *Findlay* [1981] 3 W.W.R. 60, 26 *British Columbia Law Reports* 376, 122 *Dominion Law Reports* (3d) 377 at 380 (B.C.S.C.)

It is not clear whether the *Indian Act* permits a band council to make an allotment subject to conditions, as the statute does not address the matter one way or the other. An argument could be made that part of the band council's fiduciary duty to the band as a whole in exercising its decision making power with respect to allotments, is to consider how to address the interests of partners in conjugal relationships in order to promote social order and equity and to take into account the interests of any children. These considerations could be considered part of the balancing of interests between the collective and individual referred to in the *Lower Nicola Indian Band* case.

On application from an "Indian" in possession of a Certificate of Possession, the Minister may lease the allotted land for the benefit of the locatee, pursuant to section 58(3) of the *Indian Act*. Once a Certificate of Possession has been issued to an individual band member, he or she may use the lands or develop the lands subject to zoning or other authorities of the band council and the statutory restrictions on alienation to non-members. However, the band council cannot otherwise veto a particular use or block a member's application to lease his land because it disagrees with the locatee's plans for it.[74] The Federal Court of Appeal in *Canada* v. *Boyer* described the nature of the individual band member's interest relative to the underlying communal interest of the band:

> The Band for whose use and benefit a 'tract of land' has been set apart by Her Majesty no doubt has an interest in those lands, since it has the right to occupy and possess them. It is an interest which belongs to the Band as a collectivity, and the right to occupy and possess them.... The Band...acting through its council has the power to allot, with the approval

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[74] *Canada* v. *Boyer* [1986] 2 *Canada Federal Court Reports* 393 (F.C.A.)

> of the Minister, parcels of the land in its reserve to Band members…There is nothing in the legislation that could be seen as 'subjugating' his right to another right of the same type existing simultaneously in the Band council. To me the 'allotment' of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locatee. The interest of the Band, in the technical and legal sense, has disappeared or is at least suspended.[75]

In *Tsartlip Indian Band* v. *Canada*[76], the Federal Court of Appeal held that the Minister of Indian Affairs in exercising his discretion under s. 58(3) to grant a CP holder's application to lease must give proper consideration to the interests of both the certificate holder and the band. The Court held that this duty arises from administrative law principles and is not a fiduciary duty owed by the Minister to the band. The Court observed that the *Indian Act* is "very much band-oriented where use of lands in the reserve is at issue".[77] More specifically the Court stated:

> The intent of Parliament, clearly, is to require the consent of the band council whenever a non-member of the band, and even more so a non-Indian, is to exercise any right on a reserve for a period longer than one year."[78] [*emphasis added*]

This is an important policy principle that would be relevant in addressing the respective rights of member and non-member spouses and partners on reserve on dissolution of a marriage or marriage-like relationship.

Subsection 20(2) states that a Certificate of Possession (CP) can be issued by the Minister as evidence of possession. However, as noted above, a CP is not in all cases necessary to establish lawful possession.[79]Section 21 provides for the keeping of a register in the Department of Indian Affairs ("the Reserve Land Register") in which particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve are to be recorded. Section 55 establishes the Surrendered and Designated Lands Register for the purpose of recording particulars of transactions affecting absolutely surrendered or designated lands. Unlike the Reserve Land Register, the Surrendered and Designated Lands Register gives priority to interests which are registered first in time, and to registered instruments over unregistered instruments. The purpose of these Registers presumably is to provide some certainty about entitlement to possession of certain portions of reserve land by individual members of a First Nation.

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[75] *Ibid*, paragraph 15.

[76] *Tsartlip Indian Band* v. *Canada (Minister of Indian Affairs and Northern Development)* (1999), 181 *Dominion Law Reports* (4th) 730 (F.C.A.).

[77] *Ibid* at paragraph 55.

[78] *Ibid* at paragraph 55.

[79] *Stoney Band* v. *Poucette* (1996) [1999] 3 *Canadian Native Law Reporter* 321 (Alta Q.B.); affirmed July 17, 1998, Doc. Calgary Appeal 17374 (Alta. C.A.); *George* v. *George* (1996), [1997] 2 *Canadian Native Law Reporter* 62, 24 *Reports of Family Law* (4th) 155, 139 *Dominion Law Reports* (4th) 53, 81 B.C.A.C. 62, 132 W.A.C. 63 (B.C.C.A.); additional reasons at (1997), 30 *British Columbia Law Reports* (3d) 107, 27 *Reports of Family Law* (4th) 81, 91 B.C.A.C. 163, 148 W.A.C. 163 (B.C.C.A.).

However, it is not uncommon for transfers not to be registered by the parties involved, and for subsequent disputes to arise.[80] In addition, some First Nations refuse to use Certificates of Possession and instead use a custom system of allotment. Custom allotment or custom holding has been described as follows by the Department of Indian Affairs: "This is a right to occupy reserve land which is granted to an individual by a resolution of a First Nation council. However, the First Nation does not request approval or registration of the allotment, and a CP is not issued. It is therefore not lawful possession under the *Indian Act* and is not treated as a legal interest in land under the Act."[81] Furthermore, the Indian Lands Registry does not accept these transactions or any subsequent transfers for registration as they are considered "outside the Indian Act and are not legal interests under the Act".[82]

The court in *Lower Nicola Indian Band* made the following findings regarding band council powers in relation to custom allotment:

> Ownership of reserve lands on the basis of traditional or customary use or occupation does not exist independent of the interests created by the Act. Recognition of an individual's traditional occupation of reserve lands does not create a legal interest or entitlement to those lands unless and until the requirements of the Act are met.
>
> Traditional or customary allocation of reserve lands historically has been for residential or agricultural purposes and not commercial purposes.
>
> The Band has a fiduciary duty to its members to make decisions regarding the use of its lands in the best interests of all of its members. This responsibility requires it to balance competing interests in a procedurally fair process.
>
> Where a band council acknowledges traditional customary allocation of

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[80] See for example, *Jones Estate* v. *Louis*, [1996] 3 *Canadian Native Law Reporter* 85 (F.C.T.D.).

[81] Indian and Northern Affairs Canada, "Understanding the Regulatory Environment for On-Reserve Lending", May 1999 at page 3.

[82] Indian and Northern Affairs Canada, "Understanding the Regulatory Environment for On-Reserve Lending", May 1999 at page 11.

> lands, it has a governance responsibility to establish a process for administering a claim for ownership of such lands based on traditional or customary use and occupation.[83]

While giving legal precedence to interests held by Certificate of Possession, the decision in *Lower Nicola Band* nevertheless acknowledges the reality of custom allotment systems and concludes that band councils have "a governance responsibility" to establish processes in respect to them. In his examination of the *Indian Act* land management provisions, Douglas Sanders concludes that "the *Indian Act* attempt to establish a complete and exclusive system of rights in reserve lands has not succeeded."[84] Sanders estimates that half of all bands in Canada do not use the *Indian Act* system at all and notes that some bands combine custom allotment systems with some usage of Certificates of Possession.[85]

Presumably, where the s. 2(3)(b) requirement respecting decisions of band councils is being followed, there is a local record of band council allotments in the form of band council resolutions (the most common form today of recording decisions of *Indian Act* band councils). When a dispute arises and parties seek such records from their band council, issues concerning access to information may also arise, as the *Indian Act* does not require band councils to provide band members access to records. Statutory rights of band members to attend band or band council meetings are provided only for special purposes specified by the Act such as land surrenders or adoption of membership codes.

The fact that transfers by individual band members of such lands are not always, and in fact, often are not registered, suggests the Indian Lands Registry may not reflect the social reality of land transfers on reserve nor the reality of customary law of First Nations using customary allotment. There are, in effect, competing legal systems on reserve with respect to land allotments and disputes often end up in the courts as a result. Cases such as *Lower Nicola Indian Band* are an example of this. This uncertainty affecting land allotments and transfers and proof of legal entitlement to occupy specific portions of reserve land would negatively impact efforts to clarify matrimonial real property issues.

Residency Rights On Reserve

Any rights of possession of individuals with respect to a matrimonial home on reserve necessarily would be dependent on the rights of residency on reserve. In addition to powers to make land allotments on reserve, band councils have by-law making powers with respect to rights of residency on reserve. As the Royal Commission on Aboriginal Peoples noted in its final report:

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[83] *Lower Nicola Indian Band* v. *Trans-Canada Displays Ltd.*, [2000] 4 *Canadian Native Law Reporter* 185, 2000 BCSC 1209 (B.C.S.C.) at paragraph 162.

[84] Douglas Sanders, "The Present System of Land Ownership", paper presented to the First Nations' Land Ownership Conference, September 29-30, 1988 at the Justice Institute of British Columbia.

[85] Ibid.

> Reserve residency is not an absolute right for people with Indian status or even for those who belong to a particular band, whether the membership list is maintained by the department or by the band. In fact, subject to a number of ambiguously worded limitations and guidelines, the authority to decide on-reserve residency matters rests with the band council under subsection 81(1) of the Indian Act — a power provided in the 1985 amendments.[86]

Under section 81(1) (p.1), a band council may make by-laws not inconsistent with the Act respecting "the residence of band members and other persons on the reserve" and under section 81(1) (p.2), "to provide for the rights of spouses and children who reside on reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band".

The RCAP also noted that "Unfortunately, the *Indian Act*, in most respects, is not very helpful in determining what rights, if any, an adult member of a band has to live on a reserve. For example, one might have assumed that, to protect the acquired membership rights of Bill C-31 registrants, residency rights would be part of the acquired rights that bands would be obliged to take into account in their by-laws. They are not, however. As a result, many Bill C-31 registrants who might otherwise wish to return to their reserve communities continue to live off-reserve."[87]

In addition, many women in submissions to the RCAP and other processes have drawn attention to the problem of women being affiliated automatically with the bands that Indian Affairs records show they were connected to in the past through their fathers or husbands. Many women now apply for membership in their husband's band. On breakdown of the marriage, women can encounter difficulties resuming their affiliation with the band they were born into, and asserting residency rights there. In this regard, Indian Affairs has acknowledged that "[r]egistrants would much prefer to be affiliated with a band closer to their domicile or to a band with which the mother or wife in a marriage is affiliated".[88]

The RCAP noted that many First Nation women would like to see a review of residency by-laws to ensure that they do not unfairly affect a particular group, especially as relating to Bill C-31 people. Another area identified for review affecting First Nation women was the relationship between residency by-laws and band membership codes "to ensure that the two do not operate jointly to exclude people in ways they would not do individually".[89]

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[86] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 4, Chapter 2, Record 364, RCAP CD ROM, Seven Generations.

[87] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 4, Chapter 2, Record 365, RCAP CD ROM, Seven Generations.

[88] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 4, Chapter 2, Record 366, RCAP CD ROM, Seven Generations.

The *Indian Act* provides that the Crown may bring an action in trespass, on behalf of a band or an individual band member, against "persons other than Indians" entering a reserve or occupying reserve lands and without proper authority.[90] The band itself or its members may also bring an action for trespass.[91] Since, the *Indian Act* does not define "trespass", common law principles (judge-made law) apply to determine when a trespass has taken place.[92] Entry on a reserve for lawful purposes such as serving subpoenas, seizing goods under a conditional sales contract or seizing a valid leasehold mortgage in designated land would not constitute trespass.[93]

It is not clear to what extent, and for what purposes, the Minister of Indian Affairs currently uses the authority provided by s. 28(2) of the *Indian Act* to issue permits to "any person" for a period not exceeding one year, or with the consent of the band council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.[94] The authors are not aware of whether permits for either a year without the consent of band council or for longer periods with the consent of band council have been issued to address the situation of non-member spouses with children who are band members, following a separation, divorce or other breakdowns in conjugal relationships. While such permits may be issued to address temporary rights to reside on reserve, they likely could not be used to alter the rights of a holder of a Certificate of Possession to a particular allotment of reserve land.

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[89] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 4, Chapter 2, Record 368, RCAP CD ROM, Seven Generations.

[90] *Indian Act*, R.S.C. 1985, c. I-5, s. 31.

[91] *Custer v. Hudson's Bay Co, Developments Ltd.* (1982), [1983] 1 *Canadian Native Law Reporter* 1, [1983] 1 *Western Weekly Reports* 566, 20 *Saskatchewan Reports*. 89, 141 *Dominion Law Reports* (3d) 722 (Sask. C.A.).

[92] Indian and Northern Affairs Canada, "Understanding the Regulatory Environment for On-Reserve Lending", May 1999 at page 28; Shin Imai, *The 2002 Indian Act and Aboriginal Constitutional Provisions*, (Toronto: Carswell, 2002) pages 73-74.

[93] Indian and Northern Affairs Canada, "Understanding the Regulatory Environment for On-Reserve Lending", May 1999 at page 28 *R.* v. *Bernard* (1991), 118 *New Brunswick Reports* (2d) 361, [1992] *Canadian Native Law Reporter* 33, 296 *Atlantic Provinces Reports* 361 (N.B.Q.B.).

[94] *Indian Act*, R.S.C. 1985, c. I-5, s. 28(2).

Actions in trespass and other proceedings can also be brought by bands against band members found not to be in lawful possession of lands or housing on reserve.[95]

Rights of Spouses with Band Membership but not "Indian" status

Indian Act bands that have assumed control of their membership rules pursuant to s. 10 of the *Indian Act*, can extend band membership to individuals who do not have status as Indians under s. 6 of the Act. In 1985, when this band power was recognized along with provisions reinstating certain persons to Indian status (still popularly known as "Bill C-31"), section 4.1 was also added. Section 4.1 provides that for certain sections of the *Indian Act* (including sections 20 and 22 to 25 that address rights of individual possession of reserve land) a reference to "Indian" is deemed to include any person whose name is entered on a Band List and who is entitled to have it entered on such a list. This means that band councils may make allotments of reserve land or issue Certificates of Possession to band members regardless of their Indian status under s. 6 of the Act. However, the discretion of band councils in making individual allotments to any band member remains, as well as the by-law making power to determine residency rights of band members and other persons on reserve.

Residency Rights of Non-Member Spouses and Children

Individuals who are not band members cannot obtain allotments of land by Certificate of Possession or otherwise. However, persons who are not band members can lease properties on designated lands and also may lease land held under Certificate of Possession from an individual who holds such a certificate.[96] The Act provides a penalty for trespass for persons using reserve land without authorization.[97]

The residency rights of spouses who live with band members (including those who are not themselves band members) are determined by the exercise of band council by-law making power under sections 81(1) (p.2). *Six Nations of the Grand River Indian Band* v. *Henderson*, involved a s. 15 Charter challenge to a by-law made pursuant to s. 81(1)(p.2) prohibiting non-band member spouses of Six Nations band members from residing on the Six Nations reserve.[98] The Court found that the by-law infringed s. 15 of the Charter. However the Court accepted the band's argument that for socio-economic reasons (the shortage of housing and the sudden influx of reinstated band members following the 1985 amendments to the *Indian Act*) the infringement was demonstrably justified under section 1 of the Charter. The Court also found that the legal validity of the by-law would not prevent the band council from amending it to permit non-band member spouses to reside on the reserve with their spouses and families to address hardship situations.

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[95] *Hupacasath First Nation* v. *Sayers*, [2001] *British Columbia Judgments*. No. 1083, 2001 BCSC 699 (B.C.S.C.); *Seabird Island Indian Band* v. *McNeil-Bobb*, 2000 BCSC 883, [2000] *British Columbia Judgments* No. 1133 (B.C.S.C.) [In Chambers].

[96] *Indian Act*, R.S.C. 1985, c. I-5, s. 58(3).

[97] *Indian Act*, R.S.C. 1985, c. I-5, s. 30.

[98] *Six Nations of the Grand River Band* v. *Henderson* [1997] 1 *Canadian Native Law Reporter* 202 (O.C.J. Gen. Div.).

Section 18.1 addresses residency rights in regard to children of band members: "A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody." Thus, children regardless of whether they have Indian status or band membership have a derivative right to live on reserve with a custodial parent who is also a band member and resident on reserve. Adult band members themselves have no statutory right to reside on reserve by virtue only of being a band member. Once resident on reserve however, a band member's right to live on reserve with any children of which he or she has custody, is triggered.

Recent amendments to the *Indian Act* provide a definition of a common-law partner as a person who has lived in a conjugal relationship for a period of at least one-year. This appears to include same-sex partners.[99] However, related amendments to add the word "common-law partner" where the word "spouse" appears in the *Indian Act* are limited to s. 68 (deductions from treaty money for support of deserted spouse) and paragraph 81(1)(p.2) (residency rights). This means common law and same-sex partners are not placed in the same legal position as "spouses" for all purposes of the *Indian Act*. The position of people married under Aboriginal customary law is less clear with respect to s. 68 and s. 81(1)(p.2), as the question of whether or not they fall within the *Indian Act* meaning of "spouse" has not been determined by any court to the authors' knowledge.

Section 89 provides that real and personal property of an Indian situated on a reserve is not subject to any "charge, pledge, mortgage, attachment, levy, seizure, distress or execution" in favour of anyone other than an "Indian" or a "band" within the meaning of the *Indian Act*. An exception is provided with respect to a leasehold interest in designated lands.[100] Provincial laws of general application including matrimonial real property legislation applies to such interests in designated lands.[101] As laws of general application, these would be available to married spouses regardless of Indian status or band membership. Their applicability to common–law relationships would depend on the specific provisions of each provincial and territorial statute, or the status of Charter litigation in each jurisdiction.

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[99] The *Modernization of Benefits and Obligations Act* has introduced a couple of new definitions to the Act to address the situation of common-law and same-sex partners. Subsection 2(1) of the Act is amended by adding a definition of "common-law partner" which means "a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year". "Survivor", in relation to a deceased individual, now means the surviving spouse or common-law partner *(Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 148-152).

[100] *Indian Act*, R.S.C. 1985, c. I-5, s. 89(1.1).

[101] *Dunstan* v. *Dunstan*, (2002) 100 *British Columbia Law Reports* (3d) 156 (B.C.S.C., In Chambers).

With respect to enforcement of court orders for payment of compensation or equalization payments in the monetary division of matrimonial property, non-Indian spouses are at a disadvantage relative to spouses with Indian status in terms of their capacity to execute judgments against a former spouse who is a member residing on reserve. This results from the s. 89 exemption in respect to real and personal property of "Indians" situated on a reserve. To the extent such orders may be extended to spouses in Aboriginal customary marriages or common-law partners by litigation or future legislative amendments by the relevant government, s. 89 would present similar barriers to enforcement of court orders.

Provincial/Territorial Law on Matrimonial Property

Off reserve, matrimonial property consists of personal and real property owned by either or both spouses subject to specific inclusions and exclusions determined by provincial and territorial law. Provincial and territorial laws in Canada set out legal principles for defining exactly what constitutes matrimonial property for certain purposes and for placing a value on it in order to determine an equitable division on dissolution of marriage. Provincial and territorial legislation also typically provides for interim remedies such as exclusive possession of the matrimonial home during a period of separation, or in situations of family violence. Some provinces have adopted specific family violence legislation to address the need for protection of abused family members and for the right of victims to remain in their home.[102] Generally speaking, orders of exclusive possession can be applied to homes regardless of whether the home is owned or is being leased, and regardless of which spouse may be listed on title or on the lease.

The concept of matrimonial property is relatively new to Canadian law having been introduced little more than 25 years ago. Its introduction represented a significant shift from the previous doctrine of separation of property (that on dissolution of marriage, each spouse retained the property to which he or she had title). The purpose of contemporary matrimonial property laws is to recognize the equal position of spouses within marriage, to recognize marriage as a form of partnership and to provide for the orderly and equitable settlement of the affairs of the spouses on the breakdown of the marriage. (Provincial and territorial family law also addresses the obligations of former spouses respecting the support of their children.)

Each province and territory has passed legislation addressing the division of matrimonial property - both "real property" (land and buildings on the land) and "personal property" (assets other than real property such as cash, investments, proceeds from sale of a vehicle or entitlement to a pension plan).[103] This provincial/territorial legislation expresses legal principles that can be used to guide married couples in reaching agreements out of court on the division of their matrimonial property (such agreements can be made before, during or after a marriage or other conjugal relationship). Where a couple cannot agree, the courts can apply these principles and grant remedies and make orders to address the rights and entitlements of each party.

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[102] *Alberta Protection Against Family Violence Act*, R.S.A. 2000, c.P-27; Manitoba - *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, R.S.M. 1998, D.93l; Nova Scotia - *Domestic Violence Intervention Act*, S.N.S. 2001, C.29; Ontario - The Domestic *Violence Protection Act, 2000*, S.O. 2000, c.33. (not yet proclaimed in force); Prince Edward Island - *Victims of Family Violence Act*, S.P.E.I. 1996, c.V-3.2; Saskatchewan - *The Victims of Domestic Violence Act*, S.S. 1994, c.V-6.02; Yukon Territory - *Family Violence Protection Act*, S.Y. 1997, c.12.

While there are of course differences from jurisdiction to jurisdiction, and the Civil Code of Quebec reflects the unique aspects of a civil law system, there are some common elements found in most, if not all, provincial and territorial legislation addressing matrimonial real property, such as:

- Definition of matrimonial property
- Equal rights of possession to matrimonial home during marriage
- Provision for some form of equalization payments based on value of matrimonial property
- Remedies
- Rules respecting Agreements.

Definition of matrimonial property: All provincial and territorial legislation in some manner defines "matrimonial property" or an equivalent term. The provinces of British Columbia and Manitoba use the term "family asset" rather than matrimonial property.[104] The Civil Code of Quebec uses the term "family patrimony" in the English language ("le patrimoine familial" in the French language) to describe the property owned by either spouse including the family residence and movable property.[105]

In some provinces, matrimonial property includes all personal and real property owned by either or both spouses at the time an application is made for some form of relief or remedy.[106] In other provinces, matrimonial property must also be used for a family purpose to fall within the definition.[107] Most legislation includes a specific definition of "matrimonial home"[108] or an equivalent term such as "family home"[109], "marital home"[110] or "family residence"[111] as a specific kind and subset of matrimonial property. (Only British Columbia does not.)

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[103] *Matrimonial Property Act*, R.S.A. 2000, c. M-8 (Alberta); *Family Relations Act*, R.S.B.C. 1996, c. 128 (British Columbia); *The Marital Property Act*, R.S.M. 1987, c. M45 (Manitoba); *Marital Property Act*, S.N.B 1980, c. M-1 (New Brunswick); *Family Law Act*, R.S.N. 1990, c. F-2 (Newfoundland); *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 (Nova Scotia); *Family Law Act (Nunavut)*, R.S.N.W.T. 1997, c. 18 (Nunavut); *Family Law Act*, S.N.W.T.1997, c. 18 (Northwest Territories); *Family Law Act*, R.S.O. 1990, c. F.3 (Ontario); *Family Law Act*, S.P.E.I. 1995, c. 12 (Prince Edward Island); *C.C.Q.* 1991, 1991, c.64., Division III (Quebec); *Family Property Act*, S.S. 1997, c. F-6.3 as amended by the S.S., 1998, c. 48; and 2001, c. 34 and 51 (Saskatchewan); *Family Property and Support Act*, R.S.Y 1986, c. 63 (Yukon).

[104] *Family Relations Act*, R.S.B.C. 1996, c. 128, ss. 58-59 (British Columbia); *The Marital Property Act*, R.S.M. 1987, c. M45, s. 1 (Manitoba).

[105] Article 415 of the *Civil Code of Quebec* defines "Family patrimony" as composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan. This article states that "family patrimony" also includes the registered earnings, during marriage, of each spouse pursuant to the Act respecting the Quebec Pension Plan or to similar plans.

While the matrimonial home is usually one property (the place where the family ordinarily resides), in some provinces, the definition can encompass more than one property (and thus include a summer residence) if used for a family purpose and otherwise meeting the requirements of the definition.[112]

Equal rights of possession to matrimonial home during marriage: Both parties have an equal right to live in the matrimonial home. Hence, a couple could be living separate and apart under the same roof. In certain circumstances one party can apply to court for an order for exclusive possession of the matrimonial home. This means that one party, if successful in his or her application, will have the right to reside in the matrimonial home to the exclusion of the other. Exclusive possession of the matrimonial home usually follows the person who is successful in getting custody of the children (if any). There are a number of factors that a court will consider in granting one party exclusive possession of the matrimonial home. In many provinces, matrimonial property rights only apply to married spouses. In other provinces and in the three territories, exclusive possession and other rights and remedies are also available to unmarried partners in a conjugal relationship meeting the definition of common-law relationship.

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[106] The Saskatchewan *Family Property Act*, S.S. 1997, c. F-6.3 as amended by the S.S., 1998, c. 48; and 2001, c. 34 and 51 S.S. 1997, c. M-6-11, s. 2.

[107] In British Columbia, the *Family Relations Act*, R.S.B.C. 1996, c. 128,s. 58(2) defines "family asset" generally as "Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset."

[108] The Saskatchewan *Family Property Act*, S.S. 1997, c. F-6.3 as amended by the S.S., 1998, c. 48; and 2001, c. 34 and 51 S.S. 1997, c. M-6-11, s. 2.

[109] *Family Law Act*, S.P.E.I. 1995, c. 12, s.19 (P.E.I.).

[110] *The Marital Property Act*, R.S.M. 1987, c. M45, s. 1 (Manitoba).

[111] Article 401 of the *Civil Code of Quebec*.

[112] See for example s. 3 (4) of the *Matrimonial Property Act*, R.S.N.S. 1989,C. 275 (as **amended** 1995-96, c. 13, s. 83) which provides "A person and the persons spouse may have more than one matrimonial home." In Ontario, case law has determined that the meaning of "matrimonial home" under s. 18(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 can include more than one property: *Reeson* v. *Kowalik* (1991), 36 *Reports of Family Law* (3d) 396, at 404-405 (Ont. Gen. Div.); *Schaefer* v. *Schaefer* (1986), 38 A.C.W.S. (2d) 142 (Ont. S.C.). S. 18(1) of the Ontario statute defines "matrimonial home" as "Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home."

Regardless of actual ownership by one spouse[113] or the other or both (regardless of whether one or both spouses' names are on the title to the matrimonial home) provincial legislation recognizes the right of possession of both spouses to the matrimonial home. This usually means that neither spouse can alienate (e.g. sell) the house or have an encumbrance placed on the title without the other's agreement or a court order to that effect. Generally, this does not affect the rights and powers of each spouse to freely dispose of other assets to which he or she has title during the marriage, apart from attempts to defeat the other spouse claiming his or her share in the division of property. In certain circumstances, a party may be required to give an accounting of assets disposed of within a certain period of time prior to the valuation date.

Provision for equalization payments based on value of matrimonial property: Provincial and territorial law each establish a formula for dividing the monetary value of matrimonial property based on the notion of an equal division of the value of the net family property (including real and personal property). In Ontario for example, the total value of all real and personal property held by each spouse is added up and an equalization payment of half the difference of the two amounts is made to the spouse with the lesser total. Not all provinces provide for an equalization payment. Some instead provide a party with an interest in specific property for an "equalization type" of distribution. The calculation of equalization payments can be varied by the court in certain circumstances – for example, taking into account the length of the marriage, the failure by one spouse to disclose to the other the existence of debts or other liabilities at the date of marriage, intentional or reckless depletion of his or her net family property, or if it would cause undue hardship. The court can also vary the term of an agreement between the parties on matrimonial property in limited circumstances such as:

- the best interests of a child;
- failure to provide financial disclosure;
- lack of capacity of one party to sign the agreement;
- if the agreement is not in accordance with the requirements of contract law.

In Quebec, the Civil Code provides rules for the equal division of family patrimony between spouses to a marriage upon separation, divorce or the dissolution or nullity of the marriage.[114] Unlike common law jurisdictions, if partition occurs upon separation, there can be no new partition upon a subsequent dissolution of the marriage by divorce or other means.[115]

Remedies: Provincial law generally provides a range of remedies to spouses in conflict over the matrimonial home including remedies affecting legal rights of possession, such as:

- interim orders of exclusive possession to one spouse upon separation (and pending final resolution) or in cases of domestic violence

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[113] The term "spouse" in this section of this paper refers to married spouses and common-law partners where provincial or territorial legislation applies to both.

[114] *Civil Code of Quebec*, Book Two, Title One, Chapter 4, Section III, Subsection 2.

[115] *Civil Code of Quebec*, Article 416.

- orders of partition and sale (e.g. as part of a final resolution where parties cannot agree on who should get the matrimonial home if both want it)
- orders to set aside a transaction where the matrimonial home has been sold or otherwise transferred by one spouse without the other spouse's consent.

Rules respecting Agreements: In addition to statutory rules for the division of matrimonial real property, provincial and territorial law contemplates the use of various kinds of agreements between married couples and common-law partners, such as marriage contracts, separation agreements, or cohabitation agreements. Provincial and territorial statute law often prescribes rules respecting the interpretation and effect of such agreements.

Provincial and territorial law remedies cannot be applied to matrimonial real property interests in unsurrendered reserve lands as a result of the *Derrickson* and *Paul* decisions. However, courts can, in the case of spouses who are both band members include a valuation of an interest in a reserve land allotment in calculating an equalization payment.

Provincial law respecting the division of matrimonial property other than land (personal property) applies to First Nation people on reserve, and regardless of Indian status or band membership, as a law of general application (subject to the terms of any land claim or self-government agreement). Provincial laws of general application respecting real property off reserve also apply to First Nation people.

With the exception of British Columbia[116], Saskatchewan, Quebec, Nova Scotia and the three territories, matrimonial property legislation applies explicitly only to married couples and not to common-law relationships. This distinction has been challenged in court as a violation of s. 15 *Charter* equality rights. Other provinces may reconsider this distinction and how to respond with possible legislative changes to their matrimonial property legislation. The status of people married by Aboriginal customary marriages with respect to provincial and territorial matrimonial property laws is not clear (except where addressed by a self-government or other agreement).

Provincial and territorial matrimonial property law usually recognizes situations of family violence as a ground upon which a spouse can seek an interim order for exclusive possession of the matrimonial home. Other factors include the best interests of children.

Matrimonial Real Property On-Reserve

First Nation reserve communities operating under the land management provisions of the *First Nations Land Management Act* (FNLMA) are required to adopt laws addressing the division of matrimonial real property as part of their land codes.[117] Some First Nations who have negotiated self-government and comprehensive claims agreements also have lawmaking powers respecting matrimonial property and related issues.

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[116] A couple living in a marriage-like relationship for at least two years falls within the definition of "spouse" in s. 1 of the B.C. *Family Relations Act*, R.S.B.C. C.128, s. 1, *Dlouhy* v. *Meegan*, [1998] *British Columbia Judgments* No. 2122 (B.C.S.C.).

However, the vast majority of First Nation reserve communities remain subject to the *Indian Act*, which does not address the issue of division of matrimonial property at all. The *Indian Act* does not specifically recognize lawmaking authority of First Nations over matrimonial real property nor does it address lawmaking authority in respect to situations of family violence.

Various provincial and territorial family law statutes and family violence legislation provide courts certain powers to change rights of possession to matrimonial property off reserve. On reserve, these laws cannot be applied to alter individual interests in reserve land made under the authority of the federal *Indian Act*. This has been made clear by two key decisions of the Supreme Court of Canada decided in 1986. Both cases involved applications to determine the respective interests of spouses[118] upon breakdown of marriage.

In *Derrickson* v. *Derrickson*, both husband and wife were members of the Westbank Indian Band. Mrs. Derrickson brought a petition for divorce and applied for one-half interest in the properties for which her husband held Certificates of Possession issued under the *Indian Act*. She relied on the application of provincial family law legislation in requesting this order. The Supreme Court of Canada held that provincial family law could not apply to the right of possession of Indian reserve lands. More specifically, the Court determined that provincial laws entitling each spouse to an undivided half-interest in all family assets could not be applied to land allotments on reserve. The Court stated: "The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s.91 (24) of the *Constitution Act, 1867*. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands."[119] The Court was able to make an order for compensation (and taking into account the value of the land allotment) for the purpose of adjusting the division of family assets between the spouses under the relevant provincial family law.[120] In *Standing* v. *Standing*, a superior court in Saskatchewan applied this latter finding in *Derrickson*, in determining it had jurisdiction to take the value of property situated on a reserve into account in calculating the net worth of the parties in proceedings under the provincial *Matrimonial Property Act*, even though the court did not have jurisdiction to divide the property (following the Supreme Court of Canada decisions in *Derrickson* and *Paul*).[121]

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[117] *First Nations Land Management Act*, S.C. 1999, c. 24, s. 17.

[118] The term "spouse" in this section of this paper refers to married spouses and common-law partners where provincial or territorial legislation applies to both.

[119] *Derrickson* v. *Derrickson* [1986] 2 *Canadian Native Law Reporter* 45 (S.C.C.) at page 55.

[120] *Derrickson* v. *Derrickson* [1986] 2 *Canadian Native Law Reporter* 45 (S.C.C.).

[121] *Standing* v. *Standing* (1991), 37 *Reports of Family Law* (3d) 90, 96 *Saskatchewan Reports*. 13, 85 D.L.R. (4th) 309 (Sask. Q.B.).

In *Paul* v. *Paul*, the husband and wife, both members of the Tsartlip Indian Band had been married for nineteen years. They had built a home on land on the Tsartlip Band Reserve held by the husband by way of a CP issued under the *Indian Act*. The couple had been living in the home for sixteen years. Mrs. Paul had twice successfully applied to the Supreme Court of British Columbia for an order of interim possession of the matrimonial home on two separate occasions of separation from her husband. The British Columbia Court of Appeal overturned the order on the second occasion.[122] Mrs. Paul appealed this decision and the Supreme Court of Canada ultimately ruled that provincial family law could not be used to grant an order of interim occupation of a family residence on reserve.[123] As in *Derrickson*, the Court found that the provincial legislation being relied on to make the requested order was in actual conflict with the provisions of the *Indian Act* (s. 20 under which the allotment had been made and the CP issued to the husband). The Court did not decide in *Derrickson* or *Paul* whether s. 88 of the *Indian Act* could be used to referentially incorporate provincial laws relating to land. The Court said even if this was the case, the provincial legislation being relied on was in conflict with the *Indian Act* provisions, and applying the doctrine of federal paramountcy, the federal provisions would prevail.

Mary Ellen Turpel, in her analysis of the *Derrickson* and *Paul* cases, concludes that the framing of the issues is too narrowly restricted to the division of powers issue between the federal and provincial governments.[124] Turpel concludes that the analysis of the courts in both cases excludes consideration of certain social and political factors more relevant to the concerns and interests of First Nation people, and First Nation women in particular – such as the assimilative intent of the certificate of possession system established by the *Indian Act*, and the need for protection of women and children. She notes that the issue of Aboriginal jurisdiction over matrimonial disputes was not discussed in either case.

Where the husband and wife jointly hold a CP, provincial legislation still cannot be used by one spouse to get an order of exclusive possession against the other. In *Darbyshire-Joseph* v. *Darbyshire-Joseph*, the British Columbia Supreme Court applied *Derrickson* and *Paul* and held that it could not order partition and sale under a provincial statute where a couple jointly held a certificate of possession."[125]

In a recent decision, the B.C. Supreme Court drew an important distinction between matrimonial real property located on designated lands (lands surrendered less than absolutely) and that located on unsurrendered reserve lands. In *Dunstan* v. *Dunstan*, the wife sought a restraining order against the husband to prevent him from disposing of any cattle, horses or his one-tenth interest in a ranch on reserve and to prevent him from disposing of his leasehold interest in the matrimonial home which was located on designated lands.[126] Both spouses were members of the Lytton First Nation who had separated after many years of marriage. Apart from the issue of the application of the *Indian Act*, both properties were considered to fall within the definition of "family assets" under the provincial *Family Law Relations Act*. The Chambers Judge followed *Derrickson* v. *Derrickson* in refusing the application for a restraining order against the disposition of the husband's interest in reserve lands. Mr. Justice Burnyeat decided that *Derrickson* did not apply to the issue of the cattle and horses, and that an order restraining an individual from selling them, was not a charge, pledge or mortgage nor did it constitute an attachment or seizure of personal property of an Indian within the meaning of section 89(1) of the *Indian Act*. He distinguished the situation with respect to the interests in the leasehold on the designated lands and granted the application respecting the matrimonial home. In his reasons, Mr. Justice Burnyeat stated: "While Parliament has reserved for itself 'all matters' coming within the subject of "Lands reserved for the Indians", Parliament has also established that leasehold interests in designated lands are subject to Provincial laws of general application.....By allowing a person whether or not defined as an Indian under the *Indian Act* to deal freely with a leasehold interest, I am satisfied that the Parliament contemplated that all Provincial legislation of general application would apply to such leasehold interests."

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[122] The reasons for judgment for the order on the first occasion are reported at [1983] 2 *Canadian Native Law Reporter* 103. The reasons for judgment granting the second order for interim possession of the matrimonial home are reported at [1984] 4 *Canadian Native Law Reporter* 37. The second order was overturned by a majority of the British Columbia Court of Appeal in a decision reported at [1985] 2 *Canadian Native Law Reporter* 93.

[123] *Paul* v. *Paul* (1986), 26 *Dominion Law Reports* (4th) 175 (S.C.C.).

[124] Mary Ellen Turpel , "Home/Land" in (1991) 18 *Canadian Journal of Family Law* 17.

[125] *Darbyshire-Joseph* v. *Darbyshire-Joseph* (November 30, 1998), Doc. Vancouver D106124 (B.C.S.C.).

As the *Dunstan* case shows, an aspect of the unique legal context for matrimonial real property on reserve is the different legal categories of reserve land. Matrimonial homes on reserve may be situated on any of the following four categories of land:

"Indian Act land"	Land allocated to individual band members under s. 20 of the *Indian Act*. The person listed on the Certificate of Possession has the right to live on the land and a home situated on the land allotment.
"Traditional land"	Land that is regarded as belonging to a particular family through tradition or custom.
"General band land"	Land held by the band for all band members. The right of any individual to stay in the home may depend on band policies and the type of housing located on it – capital, social or rental housing.
"Designated lands"	Reserve lands set aside for a specific period of time and a specific purpose such as industrial parks, long term lease, urban development. [127]

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[126] *Dunstan* v. *Dunstan* 2002 BCSC 335, B.C.S.C. (Burnyeat J. in Chambers) 4 March 2002.

[127] The first three of these four categories are suggested in a Public Legal Education Program Fact Sheet, Legal Services Society, B.C. "Can You Stay in the Family Home on Reserve?", reprinted June 2000.

Matrimonial homes on reserve can be classified into three categories of housing:[128]

"Capital housing"	Housing paid for by the band member(s) occupying it and for which bank loan may have been obtained or a subsidy from the band. While the band members may own the house, they may be occupying the land under a tenancy agreement with the band to occupy general band land.
"Social housing"	Housing owned by the band for which members repay the band and when the house is fully paid off, the band transfers possession to the band member(s).
"Band-owned rental"	Housing rented from the band. Some bands use tenancy agreements or adopt housing policies that address what happens if the tenants separate.

A 1998 decision of the B.C. Supreme Court, *Kwakseestahla* v. *Kwakseestahla* is authority for the principle that a court has jurisdiction to grant a consent order as part of divorce proceedings that bind the parties with respect to interests in matrimonial real property on reserve.[129] In this case, the court earlier had granted the parties a divorce and as part of the divorce proceeding, consent orders were granted giving Mrs. Kwakseestahla a life interest in the matrimonial family home. The consent orders were signed by both spouses. Subsequently, the husband sought to have the consent order relating to the matrimonial home set aside, in part, on the basis that the court did not have the jurisdiction to make the orders in so far as they pertained to real property which was on Indian Reserve land. Justice Prowse of the B.C. Supreme Court determined that the consent order was granted pursuant to an agreement reached between the parties and as the court had jurisdiction to grant consensual relief, the granting of this relief fell within its jurisdiction. Perhaps this ruling could be clarified and confirmed on a national basis by an amendment to the *Divorce Act*, to make clear that consent orders in divorce proceedings have a legally binding effect on rights of occupation and possession to land allotments on reserve.

The overall result of the case law is that provincial and territorial family law legislation does not apply to reserve land in any way that can affect individual interests in unsurrendered reserve land. Such legislation is considered to be in conflict with the provisions of the *Indian Act*, legislation validly enacted under s. 91(24) of the *Constitution Act, 1867*. This means for First Nation reserve communities who remain under the *Indian Act* land management provisions (i.e., those that have not negotiated a self-government or comprehensive claims agreement or do not come under the *First Nations Land Management Act*), there is no applicable federal and little applicable provincial/territorial law to address respective rights and interests of spouses on reserve in respect to matrimonial real property in the event of a separation or dissolution of a relationship.

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[128] *Ibid.*

[129] *Kwakseestahla* v. *Kwakseestahla* [1998] *British Columbia Judgments* No. 283.

There are no provisions in the *Indian Act* which address partition or forced sale of individual interests in reserve land whether such interests are held by CP or otherwise. There are no provisions to address possession of the family home in situations of domestic violence. This legislative gap, resulting from the non-application of provincial law and the absence of federal law, has proven to be problematic for parties unable to resolve disputes over a matrimonial home located on reserve. (The legislative gap also applies to any jointly held interest on reserve whether between family members or others[130]). The only provincial law remedy available to spouses in respect to matrimonial real property on unsurrendered reserve land is an order for compensation upon sale of the property. Such an order can be made where a court does an evaluation of all the matrimonial property including the value of any individual interests in reserve land (that fall within the definition of matrimonial property) and determines whether one spouse should be required to make an equalization payment to the other.

Compensation orders do not affect the title or right to possession of individual allotments of reserve land. This means one spouse can be found to owe the other an amount based on the division formula that takes into account the value of the reserve allotment. The courts do not have the power to order a sale of an interest in unsurrendered reserve land. The order for compensation determines what one spouse will have to pay to the other, and at times it may mean that the payor spouse will have to sell his house. The difficulty is if the payor does not have any other assets but the home and since the court cannot order him or her to sell the property, the recipient spouse has no other means of enforcing the order for compensation they have been awarded.

While legislation respecting matrimonial property in most jurisdictions applies only to a man and a woman married under provincial law, provincial/territorial family violence legislation has a wider application to include a broader concept of family relationships.

The basic issue respecting matrimonial real property on reserve is that gaps in applicable law means a lack of remedies for people who need them. The result is that couples resident on reserve whether married or common-law are generally left to themselves to find a resolution to disputes concerning matrimonial real property on reserve. If they are unable to do so, there are no legal rules or processes available to them to decide the issues for them, or to force partition of their respective interests. The lack of statutory law also means that there is no protection (such as an order for interim possession of the matrimonial home) for spouses and partners in an uneven power relationship or worse, spouses in an abusive relationship (apart from the criminal law).

There is likewise a lack of remedies for people in same-sex relationships or for family members sharing a home. Currently, the *Indian Act* does not address the property interests of persons in a common law relationship or a same sex relationship upon breakdown of the relationship or in situations of domestic violence. It also appears that some of the equitable and common law remedies available to parties in a property dispute off-reserve are unavailable to couples on-reserve, where such remedies would alter possession of reserve lands as determined by the provisions of the *Indian Act*. For example, it appears that the common law and equitable remedies of trust are not applicable on reserve to resolve disputes over individual possession within the community. In a dispute between two religious congregations of First Nation people over the use of land for which three persons in one congregation had a Certificate of Possession, but which was occupied by another congregation, the Ontario Superior Court held that the principles of trust law conflict with the provisions of the *Indian Act*.[131] *V.W.* v. *R.N.S.* is a case concerning the respective property rights of a couple in a common-law relationship who were members of the same band. The Ontario Court of Justice held that "for the same reasons that matrimonial property legislation is inoperative in so far as it purports to affect real property situate on a reserve, the common law remedy of constructive trust cannot be imposed so as to alter the ownership of rights to possession of real property on reserve."[132] The Court did add however that this conclusion did not foreclose the granting of a personal remedy of unjust enrichment (payment of monetary compensation equivalent to the interest of party taken advantage of by the other).

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[130] See for example, *Simpson* v. *Ziprick* [1995] *British Columbia Judgments* No. 1740 (Petition for partition of interest in right of possession of portion of reserve lands held by applicant father and respondent daughter as joint tenants denied on grounds that provincial Partition Act did not apply to reserve lands).

The consequences of the absence of federal law on matrimonial real property on reserve are often very negative for spouses in married and common-law relationships (as the 2000 report of the Special Representative on Protection of First Nation Women's Rights on the issue explains in detail in her report). If a woman's partner holds the CP for the land on which the matrimonial home is located, her situation can quickly become very vulnerable. If she does not have membership in her husband's band her right to remain on the reserve may vanish with the breakdown of her marriage (depending on how the band council has exercised its bylaw powers over residency). Even if she has membership, should the husband decide to transfer his interest to the band or to another member of the band, or if she is told to leave or has to leave, there is no legal remedy for her to gain possession of the house – not even on an interim basis where she is the primary caregiver to children of the marriage.

The spouse holding a CP has the upper hand, and can sell his or her interest without the consent of the other spouse or partner. Section 24 provides: "An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister." The only remedy generally available is to a spouse without the CP is an order of compensation based on the applicable provincial formula for division of marital assets (personal and real property). This remedy does not address his or her immediate need for housing for self and any children, nor is it very useful unless the payor spouse has money sufficient to pay out the order before an actual sale. This remedy is available by statute to couples in common law relationships in a few Canadian jurisdictions.

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[131] *Sault* v. *Jacobs* [2001] *Ontario Judgments* No. 1996 (O.S.C.J.).

[132] *V.W.* v. *R.N.S.* [1998] *Ontario Judgments* No. 4889 (O.C.J. Gen. Div.).

When women do hold a CP jointly with their spouse, but leave the matrimonial home upon separation or due to domestic violence, they can experience difficulty in getting another allotment from band councils, where there is a perception that the family entitlement to land has been filled, or there is a shortage of land.

Possession of on-reserve property can often determine the ability to live on reserve at all. Severe lack of housing on reserve means that a woman finding herself having to leave the matrimonial home often will either have to live in overcrowded conditions with friends or relatives, or leave the reserve altogether. The generally low income levels of First Nation women means that they are at a higher risk of becoming homeless and having their children taken into care if forced to move off reserve. In other words, dissolution of marriage on reserve can generate a succession of negative events that can quickly spiral into homelessness for some First Nation women where they are not the sole holder of a CP to the matrimonial home.

It could be argued that the inherent jurisdiction of First Nations in respect to matrimonial real property is in tact, in view of the absence of federal law on the subject and the inapplicability of provincial law. First Nations laws respecting matrimonial real property on reserve could perhaps be exercised as an inherent lawmaking power. Alternatively, if federal legislative action is not desired, even as an interim measure, pending the negotiation of self-government agreements, First Nations could consider attaching conditions to land allotments to reserve a power in the band council to reconsider allotment in the case of a marriage/relationship breakdown. Policies could be adopted to guide decision-making in such cases such as the best interests of the children, and whether any family violence is involved.

First Nation women living on reserves have been able to seek temporary restraining orders against their husbands or partners in situations of domestic violence. It would seem that the power of courts to issue orders of exclusive possession under provincial family violence laws would be restricted from application on reserves for the same reasons such orders cannot be made under matrimonial property laws. (There are no reported cases on this issue at the time of writing.)
Where restraining orders have been available to First Nation women, problems with enforcement have been encountered. For example, the Special Representative on Protection of First Nation Women's Rights stated in her report that "Women at the focus group reported that women who are victims of family violence sometimes turn to the courts to seek temporary restraining orders, which would allow them to remain in the matrimonial home with their children. However, after obtaining restraining orders, women are sometimes reportedly told by the RCMP that the band doesn't have the power to enforce the restraining order."[133]

More general concerns about enforcement of court orders in the family law area were emphasized by participants in both Matrimonial Real Property Focus Groups. Clarifying jurisdiction, raising awareness among First Nation women, encouraging First Nations leaders to take action and the adoption of suitable laws are all necessary elements to address the issue of on-reserve matrimonial real property. However, such measures will not achieve the objective of providing basic protections and rights if fundamental issues respecting the administration of justice and enforcement of First Nation laws as well as court orders are not addressed. Several participants saw a need for a range of alternative dispute resolution mechanisms in addition to access to the court system, and in particular saw a need for a specialized tribunal administered by First Nations to provide increased access and greater cultural awareness in judicial-type decision making concerning matrimonial real property in a reserve context. However, there are limitations on the scope of decision-making a tribunal can make versus a superior court.[134]

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[133] Mavis A. Erickson, "Where are the Women?: Report of the Special Representative on the Protection of First Nations Women's Rights", January 12, 2001, at p.50.

Common Law Relationships

Provincial legislation in several provinces concerning the division of matrimonial real property off reserves has been restricted to marriages sanctioned by provincial government authorities and does not apply to the dissolution of common law relationships. However matrimonial property legislation does extend to the dissolution of common law relationships in British Columbia, Saskatchewan, Quebec, Nova Scotia, Yukon, Northwest Territories and Nunavut.

The different treatment of common law relationships from married couples in regard to matrimonial real property issues was a real concern for the vast majority of Focus Group participants. It was noted that there are many First Nation people living on reserve engaged in long-term conjugal relationships outside of marriage (both opposite-sex couples and same-sex couples).

Off reserve, there are certain remedies available apart from the provisions of statutes, through "judge-made" law. As Dr. Martha Bailey notes:

> "Under the common law doctrine of unjust enrichment or the Civil Code provisions on partnership, contract or unjust enrichment, a party to a marriage-like relationship may obtain a share of property based on the party's contribution."[135]

Statutory exclusions of common law couples nevertheless have been attacked using Charter equality arguments. In *Miron* v. *Trudel*[136], the Supreme Court of Canada concluded that marital status is an analogous ground of discrimination to those listed in s. 15 of the *Charter of Rights and Freedoms*. As a result, legislated discrimination against common-law spouses can be contrary to section 15 and requires justification under section 1 of the Charter (reasonable limitation in a free and democratic society).

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[134] *Re Residential Tenancies Act*, [1981] 1 *Canada Supreme Court Reports* 714.

[135] Dr. Martha Bailey, *Marriage and Marriage-Like Relationships*, (Ottawa: Law of Commission of Canada, 2001) at http://www.cdc.gc.ca.

[136] *Miron* v. *Trudel* [1995] 2 *Canada Supreme Court Reports* 418 (S.C.C.).

In the *Miron* case, the Supreme Court held that exclusion of unmarried partners from accident benefits under a statutory insurance scheme available to married partners violated s. 15(1) of the Charter. In its ruling the Court found that discrimination based on marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination, and that marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1). Further, the Court determined that persons involved in an unmarried relationship constitute a historically disadvantaged group, even though the disadvantage has greatly diminished in recent years.

Since the decision in *Miron*, legislative exclusion of common law partners from provincial matrimonial property laws has been called into question in some provinces by *Charter* litigation. Section 15 equality arguments have been made that the absence of the same statutory rights and remedies for common-law partners as married couples (such as an order for interim possession of the family home) is unconstitutional, in situations involving estates[137] and in a matrimonial property context.[138]

Provisions of the *Matrimonial Property Act* of Nova Scotia were held unconstitutional in *Walsh* v. *Bona*[139] because of the exclusion of common-law spouses from the definition of spouses under the Act. In the *Walsh* case, a woman sought an equal division of the assets of herself and her common-law husband who had lived in a common-law relationship for approximately ten years prior to its termination. The appellant, Walsh, brought her action under the provincial *Matrimonial Property Act* (MPA) which did not include, or did not recognize, common-law spouses for the purposes of dividing matrimonial real property. The Nova Scotia Court of Appeal found this exclusion to be a violation of s. 15 equality rights. More specifically the Court stated:

> The affront to the appellant's human dignity by the MPA is the fact that the MPA recognizes that a legally married spouse contributes to the marriage relationship, financially, and in other ways (e.g., raising a family). The MPA also recognizes that these contributions allow a married couple to accumulate matrimonial assets…The appellant enjoys no such recognition. She must resort to equitable principles of resulting trust and unjust enrichment, and I have already referred to the difficulties associated with those remedies…The appellant's dignity is violated against because her relationship with the respondent is considered less worthy of recognition than the relationship of a married couple; and as a result, she is denied access to the benefits of the MPA.[140]

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[137] *Armbrust v. Ferguson* [2001] *Saskatchewan Judgments* No. 703 (Sask. C.A.).

[138] *Walsh* v. *Bona* [2000] *Nova Scotia Judgments* No. 117(N.S.C.A.); *Watch* v. *Watch* [1999]*Charter of Rights Decisions* 42.20.40-05 (Sask, Q.B.).

[139] *Walsh* v. *Bona* [2000] *Nova Scotia Judgments* No. 117(N.S.C.A.); appeal granted in *Nova Scotia (Attorney-General)* v. *Walsh* 2002 SCC 83. File No.: 28179.

[140] *Walsh* v. *Bona* [2000] *Nova Scotia Judgments* No. 117(N.S.C.A.) at para 50.

The Nova Scotia Court of Appeal did not find this distinction between married couples and common-law couples justified under s. 1 of the *Charter* as "demonstrably justified in a free and democratic society". In doing so, the Court noted that both the Northwest Territories and the Nunavut Territory have adopted legislation to provide those in a marriage relationship and those in a common-law relationship the same rights with respect to property and assets. This appeal was heard by the Supreme Court of Canada in June of 2002 and judgment rendered in November 2002.[141] The Supreme Court of Canada in *Walsh* v. *Bona* decided that the *Charter* does not require that provincial laws extend matrimonial property rights to common-law couples as these laws do for married couples. However, the *Walsh* decision does not necessarily prevent provinces from extending marriage-like rights and obligations to people in common-law relationships in certain circumstances. In *Walsh*, the SCC emphasized the importance of respecting persons' personal choice to marry or not, and the historic difference in legal obligations attached to state of marriage versus common law relationships. As the headnote for the majority decision states:

> Although the courts and legislatures have recognized the historical disadvantages suffered by unmarried cohabiting couples, where legislation has the effect of dramatically altering the legal obligations of partners, choice must be paramount. The decision to marry or not is intensely personal. Many opposite sex individuals in conjugal relationships of some permanence have chosen to avoid marriage and the legal consequences that flow from it. To ignore the differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected by the state… Although there has been growing recognition that common law spouses should be subject to the same spousal support regime as married spouses, this recognition does not extend to a division of matrimonial property, as different principles underlie the two regimes. The objective of matrimonial property division is to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the main objective of support is to meet the needs of spouses and their children. The support obligation is non-contractual and responds to situations of dependency that may occur in common law relationships.

Legislatures may take this element of personal choice into account by allowing common-law (whether opposite-sex or same-sex couples) to opt into family property schemes as Quebec and Nova Scotia recently have done.

In the meantime, the Government of Nova Scotia has undertaken some significant administrative and legal reforms. The *Law Reform (2000) Act*[142] is omnibus provincial legislation recognizing rights for common law partners (whether of the opposite-sex or same-sex) parallel to those of married couples of the opposite-sex in many areas of provincial law such as matrimonial property, family maintenance, tax, statutory compensation schemes and vital statistics among others.

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[141] *Supra*, note 139.
[142] *Law Reform (2000) Act*, S.N.S. 2000. C. 29.

The *Matrimonial Property Act* (Nova Scotia) continues to define "spouse" as "either a man or a woman who are married to each other".[143] The *Law Reform (2000) Act* defines "common-law partner as "an individual who has cohabited with the individual in a conjugal relationship for a period of at least two years, neither of them being a spouse".[144] It is not clear whether the statutory definition of "spouse" would include persons married by Aboriginal customary law. "Common-law partner" clearly includes couples of the opposite-sex or the same-sex in a conjugal relationship. Under amendments to the *Vital Statistics Act*, common-law partners may register as "domestic partners" and as a consequence, have many of the same legal benefits and obligations as "spouses" (opposite-sex partners who are married).[145] This includes rights respecting division of property upon termination of a registered domestic partnership. Upon registration of a domestic-partner declaration, domestic partners as between themselves and with respect to any person, have as of the date of registration the same rights and obligations as a "spouse" under the *Matrimonial Property Act*.[146] Termination of partnerships may be registered by Vital Statistics. A termination occurs if:

- both partners file a Statement of Termination with Vital Statistics
- both partners enter into a separation agreement in accordance with the Maintenance and Custody Act
- both partners live apart for at least one year and one partner files an affidavit with Vital
- Statistics to register the termination
- one partner marries a third party.[147]

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[143] More specifically, s. 2 (g) of the *Matrimonial Property Act*, R.S.N.S. 1989,C. 275 (as **amended** 1995-96, c. 13, s. 83) provides:
"spouse" means either of a man and woman who
(i) are married to each other,
(ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity, or
(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year, and for the purposes of an application under this Act includes a widow or widower.

[144] *Law Reform (2000) Act*, Part IX.

[145] *Law Reform (2000) Act*, Part X; *Domestic Partnerships Registration Regulations*, (Nova Scotia) O.I.C. 2001-263 (May 31, 2001, effective June 4, 2001), N.S. Reg. 57/2001.

[146] *Law Reform (2000) Act*, Part X.

[147] Province of Nova Scotia, Department of Justice "Domestic Partnerships", at http://www.gov.ns.ca/just/dompar.htm and *Domestic Partnerships Registration Regulations*, (Nova Scotia) O.I.C. 2001-263 (May 31, 2001, effective June 4, 2001), N.S. Reg. 57/2001.

In *Watch* v. *Watch*,[148] the Saskatchewan Court of Queen's Bench read common-law spouses into the definition of "spouse" in the *Matrimonial Property Act, 1997* and granted interim exclusive possession of the matrimonial home and its contents to the woman applicant. The Court held that the definition of "spouse" in the *Matrimonial Property Act, 1997*, which does not include common-law spouses, violates s. 15(1) of the Canadian *Charter* of Rights and Freedoms as it discriminates against couples in common-law relationships based on the analogous ground of marital status.
As mentioned in an earlier section of this paper, the *Modernization of Benefits and Obligations Act*[149] has introduced some changes to the *Indian Act* that recognize common-law partners on the same footing as married couples for the purposes of the Act. After one year of co-habitation, a couple may be recognized for some purposes under the *Indian Act* as equivalent to a legally married couple. This is done by adding and defining the term "common-law partner". Unless a court reads "spouse" in the *Indian Act* as also including persons in an Aboriginal customary marriage, couples married by custom would have to wait one year for recognition under the Act as "common-law partners". The *Modernization of Benefits and Obligations Act* affects only a few provisions of the *Indian Act*, which remains completely silent on the subject of matrimonial real property.

Apart from protections and rights under provincial statutory law in relation to matrimonial real property, there are additional rights available under principles of trust law developed through court decisions. The equitable principle of constructive trust has been applied to married couples and to common law relationships to prevent unjust enrichment by one partner at the expense of the other in respect to property that under legislation is typically considered "matrimonial property". Where a partner can establish by the evidence his or her contribution to the value of an asset held by the other partner, the courts can make a finding of the contributing spouse's interest in the property, regardless of whether there was a common intention that the contributing spouse take a beneficial interest.[150]

The doctrine of resulting trust can be applied requiring the partner holding title to it for the benefit of himself and the contributing person.

Since the Supreme Court rulings in *Derrickson* and *Paul*, there have been at least two cases that have concluded that some of the equitable and common law remedies available to parties in a property dispute off-reserve cannot apply on reserve to alter possession of lands as determined by the provisions of the *Indian Act*. For example, it appears that the common law and equitable remedies of trust are not applicable on reserve to resolve disputes over individual possession within the community. In *Sault* v. *Jacobs*, the Ontario Superior Court held that the principles of trust law conflict with the provisions of the *Indian Act*. This case involved a dispute between two religious congregations of First Nation people over the use of land for which three persons in one congregation had a Certificate of Possession, but which was occupied by another congregation.[151] *V.W.* v. *R.N.S.* is a case concerning the respective property rights of a couple in a common-law relationship who were members of the same band. The Ontario Court of Justice held that "for the same reasons that matrimonial property legislation is inoperative in so far as it purports to affect real property situate on a reserve, the common law remedy of constructive trust cannot be imposed so as to alter the ownership of rights to possession of real property on reserve."[152] The Court did add, however, that this conclusion did not foreclose the granting of a personal remedy of unjust enrichment (payment of monetary compensation equivalent to the interest of party taken advantage of by the other).

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[148] *Watch* v. *Watch* [1999] *Charter of Rights Decisions* 42.20.40-05 (Sask, Q.B.).

[149] *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 148-152.

[150] *Pettkus* v. Becker (1980) 2 *Canada Supreme Court Reports* 834. (S.C.C.); *Rathwell* v. *Rathwell* (1978) 83 *Dominion Law Reports* (3d) 289. (S.C.C.).

In *Miller* v. *Miller*, a case decided before the *Derrickson* and *Paul* cases, a decision of the Ontario County Court applied these equitable trust principles in a case where a married woman claimed for her contribution in work, money and money's worth during the marriage to properties held in her husband's name.[153] In *Miller*, the court found that the wife had contributed directly and indirectly to the assets and found a resulting trust and a constructive trust and ordered the husband to pay the wife a sum of $15,000 as the value of the trust. *Miller* would appear to be wrongly decided in view of the principles in *Derrickson* and *Paul*.

In *Simpson* v. *Ziprick*[154], a decision of the B. C. Supreme Court, the court relied on the Supreme Court of Canada ruling in Derrickson, in finding that the provincial *Partition Act* was inconsistent with the *Indian Act* and therefore did not apply to reserve lands. This case involved a dispute between a father and one of his daughters who held a Certificate of Possession in reserve lands by joint tenancy. The father sought a partition of their interests in the land by seeking application of the *Partition Act*. However the B.C.S.C. felt it was bound by an earlier decision of the B.C. Court of Appeal that the transfer from Ziprick (the father) creating the joint tenancy was to one of his daughters in trust for herself and her three sisters. Thus, a trust can be created in reserve lands whereby one party can hold an interest under a Certificate of Possession for the benefit of others. It appears however that trust doctrines such as resulting trust and constructive trust cannot be used to alter the legal interest a band member may have as a result of a Certificate of Possession issued under the authority of the *Indian Act*.

In any event the remedies that are available off reserve for persons in a common-law relationship seeking orders respecting division of property are not easy to obtain. This was noted by the Court in *Walsh* v. Bona:

> ...the fact that the appellant might be able to avail herself of the equitable

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[151] *Sault* v. *Jacobs* [2001] *Ontario Judgments* No. 1996 (O.S.C.J.).

[152] *V.W.* v. *R.N.S.* [1998] *Ontario Judgments* No. 4889 (O.C.J. Gen. Div.).

[153] *Miller* v. *Miller* [1983] *Ontario Judgments* No. 936 (Ont. Co. Ct.).

[154] *Simpson* v. *Ziprick* [1995] B.C.J. No. 1740 (B.C.S.C.).

> remedies of unjust enrichment and resulting trust, can hardly be equated with the presumptive rights that a married person enjoys under the MPA. Pursuing such equitable remedies is difficult, time consuming, costly and uncertain (see for example, Peter v. Beblow, [1993] 1 S.C.R. 980). If the appellant must resort to these equitable remedies, she has the burden of proof on several issues. She must prove that she made a contribution related to the acquisition of property, the value of that contribution, and that there was a reasonable expectation of receiving compensation. Another difficulty, associated with such equitable remedies, is that it may not be easy to marshal the necessary evidence in the context of a spousal relationship."[155]

Overall, it appears that couples in common-law relationships have more difficulty accessing remedies under the common law or equity respecting matrimonial real property on reserve compared to common-law couples off reserve. Further, common-law couples have no access to statutory rights or remedies respecting matrimonial real property on reserve (the same position as married couples in respect to matrimonial real property on reserve with the exception of valuation and an order of compensation). Finally, common-law couples on reserve like common-law couples off reserve are excluded from most provincial (but not all territorial) laws respecting the division of personal property (until *Charter* challenges bring about statutory change). The *Indian Act* has been recently amended to begin treating common-law spouses in the same way as married persons for some purposes but these amendments do not affect the issue of matrimonial real property because the Act is entirely silent on the subject.

In Quebec, L'assemble Nationale du Quebec has passed Bill 84, *An Act instituting civil unions and establishing new rules of filiation*[156]. This Act brings about a number of significant changes in the status of opposite sex couples living together outside marriage and same sex couples. The Act establishes a "civil union" that is available to couples of the opposite sex or the same sex, and recognizes many rights and obligations parallel to couples married under provincial law. Article 521.1 of the amended Civil Code defines a civil union as follows:

> A civil union is a commitment by two persons eighteen years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status.
> A civil union may only be contracted between persons who are free from any previous bond of marriage or civil union and who in relation to each other are neither an ascendant or a descendant, nor a brother or a sister.[157]

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[155] *Walsh* v. *Bona* [2000] *Nova Scotia Judgments* No. 117 (N.S.C.A.) at para 49.

[156] Bill 84, *An Act instituting civil unions and establishing new rules of filiation*, 2nd sess., 36th Leg. Que. (adopted 7 June 2002, in force as of 24 June 2002).

[157] Article 521.1, C.C.Q

In the English language, the Act replaces references to "spouse" with "married or civil union spouse" and references to "spouses" with "married or civil union spouses". The Bill also amended Article 365 of the Civil Code by changing, the description of marriage as "between a man and a woman" to "between two persons".[158] Any official licensed to conduct marriages in Quebec may marry couples of a civil union. This would apparently include persons within the Mohawk community who are designated by the community and the Quebec Minister of Justice to have authority to carry out marriages.[159] Federal law, such as the *Divorce Act*, is of course not affected by these changes to provincial law respecting the definition of marriage. However, Bill 84 offers a process for dissolving civil unions by a notarized joint declaration of dissolution or by judgment of court. The amended Civil Code, as a provincial law, cannot affect real property interests on reserve in Quebec. The result is that the Civil Code retains a distinction between "marriages" (redefined to refer to "two persons") and the new institution of "civil unions". The rules respecting family patrimony in Article 415 are tied to the institution of marriage by virtue of Article 414. It would appear then, that persons in civil unions (whether opposite sex or same sex) do not have access to the law respecting family patrimony.

The principle of family patrimony and the new processes in Bill 84 for addressing real property issues between spouses in civil unions whether of the same sex or opposite would not apply to real property interests on reserves in Quebec (or elsewhere) by virtue of the principles in the *Derrickson* and *Paul* cases.

Quebec and Nova Scotia have taken the approach of leaving common law couples to decide to opt into the significant legal obligations of their respective matrimonial property laws, by entering into agreements and providing a system of registration of such unions. This allows couples who are in a conjugal relationship but do not consider themselves a "family" or do not wish to take on statutory obligations with respect to matrimonial property, to exercise this choice. This element of choice thus distinguishes the application of matrimonial property legislation to common law and same sex couples under these legislative schemes from married couples.

First Nations Land Management Act

The *First Nations Land Management Act* (*FNLMA*) was passed by the federal Parliament in 1999 on the initiative of fourteen *Indian Act* Bands wishing to escape the land management provisions of the *Indian Act* in order to improve their capacities and opportunities for economic development. The Act provides the term "first nation" means an *Indian Act* band named in a schedule. Additional First Nations may request the Governor-in-Council to have the Act applied to them.

A Framework Agreement on First Nation Land Management between Canada and the

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[158] Clause 22 of Bill 84, *An Act instituting civil unions and establishing new rules of filiation*, 2nd sess., 36th Leg. Que. (adopted 7 June 2002, in force as of 24 June 2002).

[159] Article 366 of the *Civil Code of Quebec* addresses the authority of persons to conduct marriages in Quebec including this joint Quebec/Mohawk process of designating officials to conduct marriages in the Mohawk community.

14 First Nations anticipated the legislation and describes its key components and is described as "a government to government agreement within the framework of the constitution of Canada".[160] The Agreement states that it is not a treaty within the meaning of s. 35 of the *Constitution Act, 1982*.

Each community opting to come under the *FNLMA* is required to adopt a land code in accordance with the Framework Agreement which is to replace the land management provisions of the *Indian Act*. Validly adopted land codes have the effect of law. The Framework Agreement anticipates the adoption of First Nation laws to address the specific issue of matrimonial real property as part of a comprehensive land code. Article 5.4 of the Framework Agreement provides:

> In order to clarify the intentions of the First Nations and Canada in relation to the breakdown of a marriage as it affects First Nation land:
>
> a. a First Nation will establish a community process in its land code to develop rules and procedures, applicable on the breakdown of a marriage, to the use, occupancy and possession of First Nation land and the division of interests in that land;
> b. for greater certainty, the rules and procedures referred to in clause (a) shall not discriminate on the basis of sex;
> c. the rules and procedures referred to in clause (a) shall be enacted in the First Nation's land code or First Nations laws;
> d. in order to allow sufficient time for community consultation during the community process referred to in clause (a), the First Nation shall have a period of 12 months from the date the land code takes effect to enact the rules and procedures;
> e. any dispute between the Minister and a First Nation in respect of this clause shall, notwithstanding clause 43.3, be subject to arbitration in accordance with Part IX;
> f. for greater certainty, this clause also applies to any First Nation that has voted to approve a land code before this clause comes into force.

The *FNLMA* requires each community to establish a community consultation process for "the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of first nation land and the division of interests in first nation land" among other required elements of the land code.[161] Subsection 17(1) provides that a First Nation shall, following community consultations, "establish general rules and procedures in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests in first nation land." Subsection 17(2) requires each first nation within twelve months after its land code comes into force, to incorporate the general rules and procedures into its land code or enact a first nation law containing the general rules and procedures. Under subsection 17(3) the First Nation or Minister may refer any dispute relating to the establishment of the general rules and procedures to an arbitrator in accordance with the Framework Agreement.

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[160] The Framework Agreement on First Nation Land Management can be found on the website http://www.fafnlm.com.

[161] *First Nations Land Management Act*, S.C. 1999, c.24, s. 6(1)(f).

Notable aspects of the treatment of the matrimonial real property issue under the *FNLMA* are:

- The Agreement and the Act are ambiguous on the question of whether laws adopted by First Nations are an exercise of delegated federal power or are an exercise of inherent First Nations jurisdiction;
- While the requirement to address the matrimonial property issue within 12 months of adopting a land code is worded in mandatory language in s. 17, the implementation of this commitment is dependent on at least three separate actions by the First Nations in question: first on consultations being undertaken, then on the drafting of rules and procedures and finally on the incorporation of the rules and procedures into the land code or enactment as a first nation law under the *FNLMA*;
- There is no apparent means for individual members of First Nations to enforce the mandatory requirement to enact rules and procedures addressing the matrimonial real property issue;
- A requirement for non-discrimination on the basis of sex is contained in the Framework Agreement and appears to be referentially incorporated into the Act by s. 17(1);
- The requirement for non-discrimination on the basis of sex refers only to the rules and procedures and not to the law that is ultimately enacted;
- The requirement to address matrimonial real property applies to breakdown of "marriage" – it is not clear whether this is intended to apply to customary marriages or to common law relationships;
- The *FNLMA* explicitly provides for the power of First Nations to adopt land codes dealing with interests in first nation land held pursuant to allotment under the *Indian Act* or "pursuant to the custom of the first nation", as well as licences and leases[162] and provides explicit authority to pass "rules and procedures"[163] in cases of breakdown of marriage.[164] (It is not clear whether this power includes matters relating to domestic violence.)
- Band council lawmaking power in this area is subject to community approval defined as 25% plus one of eligible voters (this now includes members living off-reserve as a result of the Supreme Court of Canada decision in *Corbiere*);
- The lack of an interim or default statutory regime pending the adoption of First Nations matrimonial property laws;
- The statute and the Framework Agreement do not specifically address the issue

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[162] *First Nations Land Management Act*, S.C. 1999, c.24, s. 6(1)(b).

[163] The distinction drawn between "rules and procedures" as opposed to "codes", and "laws" under the FNLMA is not clear.

[164] *First Nations Land Management Act*, S.C. 1999, c.24, s. 17(1).

> of First Nations jurisdiction to determine matrimonial property rights in situations of violence;

Words and expressions in the *FNLMA* have the same meaning as in the *Indian Act* unless the context otherwise requires, s.2 (2). Accordingly, "spouse" is defined separately from "common-law partner" as a result of the *Modernization of Benefits and Obligations Act*.[165]

So far, four of the fourteen First Nations to which the *FNLMA* applies have adopted a matrimonial property law (Mississaugas of Scugog Island First Nation, Muskoday First Nation, Georgina Island First Nation and Lheidi T'Enneh First Nation). The four laws are quite similar to one another.

The Chippewas of Georgina Island First Nation passed a *Matrimonial Real Property Law* under the *FNLMA* in December 2000. One of the preambular paragraphs declares the intent to provide "rights and remedies, without discrimination on the basis of sex, with respect to spouses who have or claim interests in First Nation land upon the breakdown of their marriage". The law applies only to interests in First Nation land or claimed pursuant to the law. The law does not apply to situations involving two spouses, neither of whom is a member of the First Nation.

Matrimonial home is defined as:

> an interest in First Nation land that is or, if the spouses have separated, was at the time of separation, ordinarily occupied by the person and his or her spouse as their family residence, and where a parcel of First Nation land that is an interest in First Nation land for purposes of this law includes a matrimonial home and is normally used for a purpose other than residential, the matrimonial home is only the part of the interest in First Nation land that may reasonably be regarded as necessary to the use and enjoyment of the family residence.

The definition of "spouse" in this law may include marriages under provincial law as well as customary law (the issue is not clear) but does not appear to include common law marriages:

> "spouse" means either of a man and woman who:
> a. are married to each other; or
> b. have together entered into a marriage that is voidable or void, in good faith on the part of the person relying on this clause to assert any right under this law.

Part 2 of the law contains provisions relating to domestic contracts. Part 3 provides the Lands Advisory Board with authority to administer mediation for spouses unable to conclude their own domestic contract regarding their respective interests in matrimonial real property. This includes provision for "compulsory mediation." The costs of mediation are to be paid equally by each spouse. Successful mediation is to result in a written separation agreement that contains the agreement of the parties respecting interests in First Nation land; and is to include provision for all interests in First Nation land held by either spouse, or both spouses.

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[165] *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 148-152.

Focus Group participants expressed a strong interest in mediation processes and emphasized the need for these to reflect First Nation traditions and values respecting dispute resolution. However, difficulties could arise where mediation is mandatory and a First Nation woman is leaving a relationship that involved violence. Many women feel intimidated by the man and may agree to a settlement because they fear the consequences of refusing. Specific mediation techniques are clearly needed to address these situations.

It is not clear from the mediation requirement in the *Matrimonial Property Law* whether both parties will also have access to independent legal advice on whatever agreement may be reached.

Part 4 provides for access to a court of competent jurisdiction (the Ontario Superior Court of Justice or the Unified Family Court of Ontario) where mediation under Part 3 is not successful. In such cases, a court of competent jurisdiction may deal with interests in First Nation land held by either spouse, or both spouses, in a manner consistent with the provisions of the *Family Law Act* (Ontario). This means provincial matrimonial real property law relevant to the ownership, possession or occupancy of real property, the division of interests in real property, and net family property representing the value of interests in real property would apply on the relevant reserves on a case by case basis (as parties bring applications to court for this purpose). (It should be noted that any approach involving the further application of provincial matrimonial property laws were regarded by some Focus Group participants as not supportive of general First Nation goals of reasserting community control over property issues and reclaiming First Nations traditions.)

There are no provisions addressing situations where parties cannot afford the cost of the compulsory mediation. This may be a barrier to lower income spouses, and ultimately a barrier to access to the courts where a more difficult and wealthier spouse holds a CP to the matrimonial home and is less inclined to settle out of court.

Overall, the Georgina Island *Matrimonial Property Law* is quite comprehensive. Among other matters, the law provides that:

1. the courts may make any order in relation to interests in First Nation land held by a spouse, or by both spouses, that the court may make in respect of real property situated in the province of Ontario, including orders to transfer an interest in First nation land to a spouse absolutely or for partition and sale of an interest in First Nation land held by both spouses;
2. a spouse may apply for an order declaring the right of possession to the interest in First Nation land;
3. regardless of which spouse holds an interest in First Nation land that is a matrimonial home, the court may on application order that one spouse be given

exclusive possession, including interim or temporary orders (and provides guidance for situations where children are involved);

4. the possession of an interest in First Nation land under the *Matrimonial Real Property Law* by a person who is not a member is not assignable and shall be deemed to terminate when that person ceases to use or occupy that interest personally.

Laws, adopted by Mississaugas of Scugog Island First Nation and Muskoday First Nation, are similar to the Georgina Island *Matrimonial Real Property Law*. Each of these laws represent a huge step forward compared to the situation under the *Indian Act*. The First Nations under the *FNLMA* can call on the assistance and resources of the Lands Advisory Board to further develop and refine laws in this area as required.

Self-Government Agreements

The 1995 Aboriginal Self-Government Policy acknowledges an inherent right of self-government as an existing s. 35 right but does not acknowledge that any particular First Nation has such an existing right. The federal willingness to negotiate self-government agreements recognizing First Nation jurisdiction in certain areas as described by the policy, apparently does not involve an acknowledgement of any inherent jurisdiction in those areas. Thus the federal government's willingness to negotiate subject-matters that are relevant to matrimonial real property (discussed below) does not necessarily involve an acceptance of any First Nation inherent jurisdiction in the area.

Under the federal self-government and comprehensive claims policies, several agreements have been reached with various First Nations which address First Nation authority over their reserve lands or settlement lands. Negotiations have demonstrated a range of different approaches to the question of matrimonial property from not specifically addressing it, to choosing to have provincial laws of general application apply to specifically providing that the First Nation will develop laws regarding the division of matrimonial real property (in the case of one Agreement-in-Principle).

Most self-government agreements do not specifically mention jurisdiction over matrimonial property in provisions listing the lawmaking authority of First Nations. It appears that where self-government agreements recognize First Nation jurisdiction over reserve land or settlement land, the ability to make laws with respect to matrimonial real property is presumed. Sectoral self-government agreements (agreements that deal with specific subject matters such as education alone) do not deal with real or personal property at all, including matrimonial property.

Some self-government and comprehensive agreements provide for the application of provincial laws respecting matrimonial real property through general provisions respecting the application of provincial laws of general application to the settlement lands of the First Nation. The Nisga'a Final Agreement deems Nisga'a settlement lands not to be s. 91(24) lands (lands reserved for the Indians). This means that in the absence of a Nisga'a law on the subject of matrimonial real property respecting Nisga'a lands, provincial laws of general application would apply.

In the case of the 1993 Champagne and Aishihik First Nation Self-Government Agreement, for example, the matter may fall within article 13.3.2 – "allocation or disposition of rights and interests in and to Settlement Land, including expropriation by the Champagne and Aishihik First Nations for Champagne and Aishihik First Nations purposes". It is not clear whether this lawmaking authority is restricted to the power to make allotments of reserve land and other interests or whether it also includes powers to address matrimonial property issues to the same extent as provincial governments. However, if one assumes the Agreement is silent on the subject, then territorial laws of general application would apply by virtue of Article 13.5 of the Champagne and Aishihik First Nations Self-Government Agreement. Alternatively, if the lawmaking power respecting allotments includes matters relating to matrimonial real property, then territorial law would apply until displaced by a validly enacted Champagne and Aishihik First Nation law (13.5.3). This self-government agreement also provides for the adoption by the Champagne and Aishihik First Nations of any law of the Yukon or Canada as its own law in respect of matters provided for in the Agreement (Article 20.1). This would seem to allow for the adoption of territorial law on matrimonial real property instead of having to enact their own law, if this is an area of lawmaking authority falling within First Nation authority. (The Champagne and Aishihik First Nation Self-Government Agreement was finalized before the 1995 federal Aboriginal Self-Government Policy was adopted.)

The Nisga'a Final Agreement contains a similar clause recognizing Nisga'a power over allocation and disposition of land without specifically addressing matrimonial real property issues. The Nisga'a Final Agreement also has a number of provisions that lead to the application of provincial family laws in the area of matrimonial property. To begin with, Nisga'a Lands over which the Nisga'a Nation has authority are deemed not to be "lands reserved for the Indians" within the meaning of s. 91(24) (General Provision 10) and the *Indian Act* no longer applies apart from determining who is an "Indian" (General Provision 18). In addition, General Provision 13 provides that federal and provincial laws of general application will apply to the Nisga'a Nation, Villages, Citizens and Lands. (In the event of any inconsistency with the Agreement or its settlement legislation, the Agreement and its legislation prevail over provincial or federal legislation.) In a presentation to the Standing Committee on Aboriginal Affairs and Northern Development in 1999, the Nisga'a Tribal Council stated:

> Federal and provincial laws apply to the Nisga'a Nation, Nisga'a Villages, Nisga'a citizens, and Nisga'a Lands subject to any conflict or inconsistency with the Final Agreement or the settlement legislation. (General Provisions Chapter – paragraph 13) The Final Agreement is silent about matrimonial property law, divorce, division of property, etc. Therefore federal and provincial laws apply. Division of matrimonial property will be determined under provincial laws of general application, to which the *Charter* obviously applies.[166]

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[166] Nisga'a Tribal Council Presentation to Standing Committee on Aboriginal Affairs and Northern Development, November 4, 1999. Available on Nisga'a Tribal Council website at http://www.ntc.bc.ca/standing1.html.

The Nisga'a Agreement also contains some unique provisions allowing for the replacement of Certificates of Possession under the *Indian Act* with an estate, interest or licence in the land at least equivalent to the interest the person would hold under a Certificate of Possession. Ultimately, these new land interests could be registered in the B.C. Land Torrens system (the provincial land registry system.) The Nisga'a Nation can protect any such interests from alienation outside the Nation simply by adding such a condition to the interest. It is likely that on the settlement legislation coming into effect to ratify the Nisga'a Final Agreement, provincial matrimonial property law began to apply to Nisga'a Lands held under *Indian Act* Certificates of Possession given that these lands as of that point would no longer be s. 91(24) Indian reserve lands.

At the very least, such lands would be subject to provincial matrimonial property law at the point at which any were registered in the B.C. Land Torrens system. (The Nisga'a Final Agreement also allows for the creation of Nisga'a fee simple lands.)

The 2001 Meadowlake First Nation Comprehensive Agreement-in-Principle takes the approach of addressing the subject of lawmaking authority over family property in considerable detail in Chapter 26. In a remarkably concise and clear manner the Agreement describes First Nation authority over a range of family law matters and covering all the basic issues at stake with respect to matrimonial real property:

> 26.03 Family support and property
> (1) A MLFN has Jurisdiction with respect to:
> (a) the support of:
> (i) spouses;
> (ii) cohabiting partners;
> (iii) children;
> (iv) parents;
> (v) vulnerable family members; and
> (vi) other dependent persons;
> (b) the division or use of property on MLFN Lands belonging to spouses or cohabiting partners, including matters relating to the use, sale or division of equity in a marital home or an Interest in MLFN Lands; and
> (c) contracts entered into with respect to the matters described in Paragraphs (a) or (b).
> (2) A MLFN Law enacted in accordance with Subsection (1) will accord rights to, and provide for the protection of, spouses, cohabiting partners, children, parents, vulnerable family members and other dependent persons that are equivalent to the rights and protection enjoyed by similarly situated individuals in accordance with applicable federal or provincial laws.

Most self-government agreements, including the two mentioned above, recognize First Nations lawmaking authority with respect to marriage to some extent but do not address jurisdiction over annulment or divorce. The Meadowlake First Nation Comprehensive Agreement-in-Principle recognizes a First Nation jurisdiction in respect to the legal capacity to marry and the solemnization of marriage; provides for provincial recognition of marriages solemnized under First Nation authority (and vice versa) and identifies as a topic for future negotiation with the Province of Saskatchewan the recognition of a marriage performed under Meadowlake First Nation law within Saskatchewan but not on First Nation land (Article 26.02). The First Nation jurisdiction does not extend to the annulment of a marriage or to divorce.

The Aboriginal Self-Government policy adopted by the federal government in 1995 includes lawmaking authority over "marriage" and over property rights on reserve among subjects that may be included in a self-government agreement.[167] "Divorce" is one of several areas identified as an area that would remain primarily with the federal government but also where the federal government is willing to negotiate some measure of Aboriginal authority or jurisdiction. Under this policy, federal divorce legislation would prevail in the event of a conflict with First Nation divorce legislation.

Customary Marriages

The issue of whether and how Canadian law recognizes Aboriginal customary law relating to marriage is an important aspect to the matrimonial real property issue on reserve. First Nation people and courts must be able to accurately identify the relationships to which any division of matrimonial property rules under federal, provincial/territorial or First Nation law would apply on or off reserve. It is also important to determine what governmental authorities may determine when, and how, a marriage has been, or can be, terminated.

There is a limited amount of legal commentary[168] and case law on the recognition of Aboriginal customary marriages.[169] On the whole, Canadian law has accepted the validity of Aboriginal marriage by custom where the necessary elements identified in the *Connolly* case exist.[170] These elements are - validity in the community, voluntariness, exclusivity, and permanence. There are likely strong arguments that marriage by Aboriginal custom is an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, and that a claim based on the resulting marital status is an exercise of that right.

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[167] Canada, *Aboriginal Self-Government* (Ottawa: Indian Affairs and Northern Development, 1995).

[168] Susan Corrigan, "A Note on Canadian Indian Marriage Law" (1974) 4 *Western Canadian Journal of Anthropology* 17; Henry H. Foster, "Indian And Common Law Marriages" (1975) 3 *American Indian Law Review* 83; Bradford W. Morse, "Indian and Inuit Family Law And The Canadian Legal System" (1980) 8 *American Indian Law Review* 199; Douglas Sanders, *Family Law and Native People* (Ottawa: Law Reform Commission of Canada, 1975).

[169] *Connolly* v. *Woolrich and Johnson* (1867) 17 *Rapports judicaires revises de la province de Quebec* 75 (Q.S.C.), affirmed [1869] 1 *Revue legale* 253; *Fraser* v. *Pouliot* [1881] 7 *Quebec Law Reports* 149;*R.* v. *Nan-E-Quis-A-Ka* (1889), 1 *Territories Law Reports* 211 (N.W.T.S.C.); *The Queen* v. *Bear's Shin Bone* [1898-1901] 4 *Territories Law Reports* 173 (1900) (N.W.T.S.C.); *Re Sheran* [1898-1901] 4 *Territories Law Reports* 83 (N.W.T.S.C.); *Re Noah Estate* [1961] 36 W.W.R. 557 (N.W.T.T.C.); *Rex.* v. *Williams*, [1921] 30 B.C.R. 303 (B.C.S.C.); *Manychief* v. *Poffenroth* (1994), 25 *Alberta Law Reports* (3d) 393 (Alta. Q.B.).

[170] *Connolly* v. *Woolrich and Johnson* (1867) 17 R.J.R.Q. 75 (Q.S.C.), affirmed [1869] 1 R.L. 253; *Manychief* v. *Poffenroth* (1994), 25 *Alberta Law Reports* (3d) 393 (Alta. Q.B.).

The leading case respecting recognition of Aboriginal customary marriage is *Connolly* v. *Woolrich and Johnson*[171], an 1867 decision involving an estate of a man of European descent married to a Cree woman according to Cree custom in 1803, who subsequently left her and married another woman in Quebec under Quebec law. *Connolly* concerned the validity under Canadian law of the marriage conducted in accordance with Cree custom in 1803 in the Athabaska region (before English law was considered to be received in the Northwest Territories). The marriage was found to be valid by the Quebec Superior Court having three essential characteristics: voluntariness, permanence and exclusivity.

Cases since *Connolly* v. *Woolrich and Johnson* have generally supported the recognition of Aboriginal customary marriages. A 1994 superior court decision from Alberta examined the history of recognition of Aboriginal customary law respecting marriage in a fair amount of detail. In *Manychief* v. *Poffenroth*, Justice McBain of the Alberta Court of Queen's Bench made some general conclusions about the recognition of Aboriginal customary marriages (he variously used the terms "native marriage", "Indian marriage" and "customary Indian marriage" interchangeably). These conclusions were made in the specific context of a claim for compensation by an Aboriginal woman under the provincial *Fatal Accidents Amendment Act* (*FAA*):

- Although common law wives are not included in the meaning of "wife" under fatal accident compensation statutes (by previous judicial decision), a wife from an "Indian marriage" could bring herself within the *FAA*, where the law recognizes the validity of that marriage;
- On the whole, Canadian jurisprudence has accepted the validity of native marriage by custom;
- The validity of a customary Indian marriage and resulting status makes sense, provided native laws and customs are not repugnant to natural justice, equity and good conscience. A customary Indian marriage having the necessary elements Justice Monk identified in Connolly of validity in the community, voluntariness, exclusivity, and permanence should satisfy this non-repugnancy test.
- It is arguable that marriage by Indian custom is an aboriginal right, and that a claim based on the resulting marital status is an exercise of that right. If this is the case, that status is recognized, affirmed and guaranteed by s. 35 of the *Constitution Act, 1982* provided it had not been properly extinguished prior to 1982.
- If one shows marriage by custom was an integral part of a distinctive aboriginal culture (i.e. possibly by a lengthy recognition of that practice) at the time sovereignty was asserted, this likely establishes an aboriginal right. A recognition of marital status would naturally flow from that right. (The Court relied on the decisions of the B.C.C.A. in *Delgamuukw* and *Van der Peet* for this point.)
- As the *FAA* is completely silent as to what "wife" means, and the FAA and its previous versions say nothing about extinguishing the right of a wife by customary Indian marriage to bring an action in respect of her spouse's death, marriage by custom of the Blood tribe is an aboriginal right, now protected by the Constitution, not having been extinguished prior to 1982.

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[171] (1867) 17 *Rapports judicaires revises de la province de Quebec* 75 (Q.S.C.).

On the specific facts in *Manychief*, the Court held that the relationship failed to show a distinct Aboriginal dimension and was "nothing more than the type of common-law relationship one frequently sees in the non-native community". The Court rejected the plaintiff's argument that the perception of the community of her relationship represented an evolution of Blood custom relating to marriage. Nevertheless, the case represents a strong affirmation of customary Aboriginal marriages as equivalent to marriages conducted under provincial law for the purposes of the legislation in question.

It is worth noting that in the United States, the jurisdiction of Indian nations over "domestic relations" is well settled and includes divorce.[172] The Confederated Tribes of the Grande Ronde Community of Oregon have passed a Divorce Ordinance empowering the Grande Ronde Community of Oregon Tribal Court with the power to dissolve marriages in the case of uncontested divorces where no children are involved and subject to certain other limitations. This authority extends to a spouse who is neither a tribal member nor a resident of the reservation where that spouse has consented to the jurisdiction of the Tribal Court.[173]

Aboriginal Customary Law

First Nation scholars have emphasized how difficult it is to explain and relate First Nation notions of law and collectively held values in a way that can be properly understood by western legal thinkers.[174] Many aspects of First Nation law, values and worldview are radically different from their European-based counterparts. In a detailed piece of scholarship, Sakej Henderson shares his understanding of the Mikmaq model of "legal inheritances", a model consisting of individual freedoms within a circle of communal responsibilities. He explains:

> The First Nations' legal inheritances are a realm of freedom, united by a deep and lasting communal worldview. This worldview can be symbolized as a medicine wheel,...in which the Four Responsibilities can be translated as peace, kindness, sharing and trust.[175]

Sakej Henderson explains in detail how individual legal freedoms lived within each of the Four Responsibilities. In explaining the concept of kindness and relating it to domestic or family law, he states:

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[172] See the cases cited at paragraph 6 of *Weston* v. *Jones*, 1999 SD 160 (South Dakota Supreme Court, December 22, 1999).

[173] A copy of The Confederated Tribes of the Grande Ronde Community of Oregon Divorce Ordinance can be found at http://www.tribalresourcecenter.org/pages/codes.htm.

[174] See for example, James [sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996), 23 *Manitoba Law Journal* 1; Patricia A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992), 56 *Saskatchewan Law Review* 237; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nation women" (1993) 6 *Canadian Journal of Women and the Law* 174.

[175] Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model".

> The normative order of the Mikmaq presumed existence of a firm consensus about right conduct and shared responsibilities. Oral traditions taught that the key to understanding their domestic law was kindness, with emphasis on empathy. They did not create any European-style system of written positive rights. Instead they lived within the complex encoding of rituals and commitments that renewed their understandings and experiences. In English thought, this might be seen as similar to a broad family law, but that analogy is far from adequate.
> Mikmaq customary law was a subtle and complex normative order, where flux was the universal norm and there was no noun-based system of positive law. To codify this subtle order would be to change it. From a Mikmaq perspective, to freeze understandings into rules violated processes designed to balance the inherent flexibility of their worldview. No one person made or declared the customary rituals and solutions. 'Rules' were local solutions based on the experiences and consensual understandings. Customary laws were implicit guidelines developed from examples or tacit models of conduct, rooted in spiritual force, similar to instinct in the animal world and as natural as gravity to modern science. These guidelines were captured in oral traditions and rituals, and the shared hardships and joys of living....Mikmaq customary law produced a matrix of processes which provided guidelines in broad outline, not precise detail. But its standards were neither universal, objective nor enforced by man-made institutions. Initiating the customary process was a family responsibility, remedy was a clan function.[176]

Authorities on customary law in societies outside Canada have also remarked on the advantages of the flexibility of oral customary law and the difficulties and risks inherent in attempts to codify it.[177] Some of the advantages of oral customary law include:

- Flexibility and adaptability as conditions and values of the people change
- Embodies and reflects the unique knowledge traditions of the people concerned (systems of organizing and conveying information and understanding of the world)
- Relies on an esteemed and valued role of elders in transmitting knowledge and values.

The very nature of oral customary law is antithetical to codification and threatens its accuracy and its legitimacy as well as its inherent value as a living, dynamic system of knowledge and thought.

Further differences in approach between European-based legal thought and First Nation notions of law are evident in matters having to do with marriage. Sakej Henderson explains in a Mikmaq context:

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[176] Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model".

[177] H. Patrick Glenn, "The Capture, Reconstruction and Marginalization of 'Custom'" (1997) 45 *American Journal of Comparative Law* 613; Walter O. Weyrauch, "Oral Legal Traditions of Gypsies and Some American Equivalents" (1997) 45 *American Journal of Comparative Law* 407.

> In this private law, and similar to classical Roman law, matrimony was not a legal category; it was a personal decision and part of family management based on equality. In fact, there was no word in the Mikmaq language for male or female, or gender. Until the partners consented to be allied, each was free to enjoy their bodies as they pleased. Once the partners and their families had consented to a union, fidelity was required as a matter of self-discipline. But after union, both partners were free to separate at any time. The families settled any problems that might arise.[178]

The effectiveness of Mikmaq customary law relied on the value placed on self-control or discipline rather than authority from above and responsible behaviour was rewarded with honour, respect and solidarity.

The problem with suggesting that federal legislation recognize Aboriginal customary law in respect to disputes over possession of the matrimonial home or other matrimonial real property located on-reserve, is that the issue is framed in terms of private property rights that have been introduced into the reserve community from the outside and often imposed through the dynamics of colonialism. The discussion presumes recognition of Aboriginal customary law and the continued application of the *Indian Act* at the same time. Reserves by their nature are not customary, apart from their connection in most, but not all, cases to the traditional territory of the people concerned. Systems of individual allotment of "reserve" lands are thus alien to customary law on two counts. One could argue that these legal systems are fundamentally incompatible and irreconcilable and that true customary law would be more effectively and appropriately recognized through land or self-government rights negotiations.

Another challenge for any effort to genuinely respect and recognize Aboriginal customary law is that it is not a system of law based on lists of jurisdictional powers but rather, is a flexible, dynamic and holistic knowledge system. In addition, a discussion of lawmaking authority over "division of matrimonial property" presumes a certain conception of property and notions of private individual ownership that are often not consistent with the customary law and values of most First Nations. Aboriginal law and Aboriginal customary marriages have not yet achieved a status equal to federal and provincial laws in the area of matrimonial real property.

And finally, if one compares the tiny area of lawmaking authority recognized under the *Indian Act* in relation to land and family law, to the authority provincial governments enjoy, it is not fair to expect that First Nations will be able to address matrimonial real property issues as effectively as provincial/territorial governments without recognition of a similar scope of authority.

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[178] Henderson. "First Nations' Legal Inheritances in Canada: The Mikmaq Model".

Family Violence and the Matrimonial Home in First Nations Communities

Family violence is one of the most devastating and demoralizing forms of oppression in our society. The effects of family violence have far reaching implications for the victims and children who witness the violence. While men can be the victims of family violence, more often than not, it is women and children. Family violence takes many forms – including physical, psychological, sexual, emotional and financial abuse and can be defined to include any member of a family. In looking at family violence among First Nation people, context is very important.

Family violence in a First Nations context is viewed by many First Nation people as a social ill that has evolved as a result of the historical injustices and cultural assaults experienced over centuries of colonization. In this regard, one authority has defined family violence in an Aboriginal context as:

> ... a consequence to colonization, forced assimilation, and cultural genocide, the learned negative, cumulative, multi-generational actions, values, beliefs, attitudes and behavioural patterns practiced by one or more people that weaken or destroy the harmony and well-being of an aboriginal individual, family, extended family, community or nationhood.[179]

Karen Green has described some of the roots of family violence in First Nation communities:

> According to Sharlene Frank, in a 1991 study by the Aboriginal Nurses Association of Canada….it was found that three leading factors which sustained family violence were alcohol and substance abuse, economic problems and intergenerational abuse.
> The roots of this problem are deep and have a long history. The loss of Aboriginal culture and tradition rendered many Aboriginal people, both men and women, powerless and dependent. Acknowledging the root of the problem will empower individuals, families and communities to address the issue.[180]

The high rate of family violence in First Nation communities has been documented in several reports.[181] In fact, violence and abuse of women and children has been described by First Nation women as reaching epidemic proportions.[182] A survey conducted by the Ontario Native Women's Association in 1989, found that 80% of Aboriginal women had personally experienced family violence, while 50 % of the participants in a survey by the Indigenous women's collective indicated that they had been physically abused.[183]

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[179] Health Canada-National Clearinghouse on Family Violence, *Family Violence in Aboriginal Communities: An Aboriginal Perspective* (Ottawa: Health Canada, 1996), p. 1. Other definitions of family violence are discussed in Evelyn Zellerer, *Violence Against Aboriginal Women*, Research Report prepared for the Royal Commission on Aboriginal Peoples, August 1993 (RCAP CD ROM at Record 117844).

[180] Karen Green, "Family Violence in Aboriginal Communities", B.C. Institute Against Family Violence Newsletter, Vol. 8, Issue No. 2 2001.

[181] See for example, A.C. Hamilton and C.M. Sinclair (Commissioners), *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, Chapter 13: Women. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991), and Emma D. LaRocque, the *Royal Commission on Aboriginal Peoples, The Path to Healing*. (Ottawa: Canada Communications

The plight of women caught in relationships of abuse can lead to other dire situations. When minor children of one or both band members are involved then the consequences can have even further reaching effects. As an example, when one woman left an abusive relationship with her husband she was unable to get exclusive possession of the matrimonial home which was located on her husband's reserve. That woman became homeless, living with different relatives with whom she could stay for one or two nights at a time. This situation was compounded by the fact that she did not want to go back to her birth Band because she was no longer a member there.[184]

When the cycle of family violence comes to a head, victims of violence often seek protection from police and the court system. Family law litigation typically involves separated spouses who are dealing with the emotional toll that a break-up often entails. When it is complicated with the issue of family violence, it can have a devastating impact on the victims of violence and their children. Quite often legal proceedings must be commenced on an urgent basis. First Nation women who live on reserves that are isolated without adequate community and financial resources are substantially more disadvantaged than women in the general population. Work is required on an urgent basis, not only to bring relief to the victims of family violence and their children, but also to assist them in the healing process. There is a need for a range of responses by all levels of governments to make the safety of First Nation women a priority in a family law context.

This discussion paper is primarily focused on the challenge of how to ensure that women on reserves have access to the same level and scope of legal remedies with respect to matrimonial real property as women off reserve. Unfortunately, the scope of protection is not as broad as off reserve because of the constitutional and enforcement challenges discussed in other sections of this paper. Criminal law remedies and some provincial civil law remedies of general application are available on reserve to women seeking protection from abusive partners. Federal law is silent on the subject of family violence in a civil context on reserve. Issues relating to First Nation jurisdiction remain outstanding.

For example, even where women on reserve are able to obtain a restraining order under the *Criminal Code*, they cannot get an order for exclusive possession to secure a home for themselves and any children that they may have - unless they are the sole

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Group, 1994).

[182] A.C. Hamilton and C.M. Sinclair (Commissioners), *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People,* Chapter 13: Women. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991), at p.7.
[183] *Ibid* at p.9.

[184] Mavis A. Erickson, "Where are the Women?: Report of the Special Representative on the Protection of First Nation women's Rights", January 12, 2001 at p.74.

person named on a Certificate of Possession or its equivalent. The problems presented by the non-application of certain provincial statutes and the lack of federal legislation was succinctly described by the Royal Commission on Aboriginal Peoples:

> The male partner's control of the residence becomes problematic if a woman is assaulted and calls for protection in the form of a restraining order restricting the man's access to the marital home. The assault charge will be dealt with as a criminal matter, but if she wishes to have sole occupancy of the marital home, the woman must also launch a civil action in another court. If the marital home is on a reserve, the provincial court is unable to handle the case because it falls within federal jurisdiction over "Lands reserved for the Indians", yet federal legislation to deal with the matter does not exist. Consequently, women often have no alternative but to leave the marital home. Given the shortage of housing on most reserves, women in these circumstances usually have to choose between moving in with relatives already living in overcrowded homes, or leaving the community. The trauma of abuse is thus compounded by the loss of the woman's home, extended family and familiar surroundings.[185]

Provincial/Territorial Family Violence Legislation

Six provinces and one territory have adopted domestic violence legislation to provide civil law remedies in addition to criminal law protections. Alberta,[186] Manitoba,[187]Nova Scotia, [188] Prince Edward Island,[189] Saskatchewan[190] and the Yukon Territory[191] have all enacted family violence legislation. Ontario has passed the *Domestic Violence Protection Act, 2000* which received Royal Ascent on December 21, 2001 but as of the date of writing, has not yet been proclaimed in force.[192]

These provincial and territorial laws allow people to apply to court through simplified legal procedures (and in some provinces by telephone) for restraining orders against violent spouses or other family members and for orders of temporary exclusive possession of the matrimonial home. Applications typically can be made by the victim or by designated persons on their behalf such as a social worker. These remedies are intended for use in conjunction with the criminal law to protect victims of family violence. This legislation tends to include a broad range of family relationships from common-law relationships to married couples to members of the same family. While such laws cannot get to the roots of the causes of family violence, they can provide some basic protection for victims of violence in terms of personal security and address the need of victims to stay in their own homes.

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[185] Report of the Royal Commission on Aboriginal Peoples, Volume 5, Record 13691.

[186] Alberta *Protection Against Family Violence Act*, R.S.A. 2000, c.P-27.

[187] Manitoba *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, R.S.M. 1998, D.93.

[188] *Domestic Violence Intervention Act*, S.N.S. 2001, C.29.

[189] Prince Edward Island *Victims of Family Violence Act*, S.P.E.I. 1996, c.V-3.2.

[190] Saskatchewan *The Victims of Domestic Violence Act*, S.S. 1994, c.V-6.02.

[191] Yukon Territory *Family Violence Protection Act*, S.Y. 1997, c. 12.

[192] Ontario - *The Domestic Violence Protection Act, 2000*, S.O. 2000, c.33.

In Ontario for example, when there is a significant risk of post-separation harassment or violence, a civil restraining order can be sought. This permits a court order to be made restraining a person from molesting, annoying or harassing the applicant or a child in a person's care. Such orders can require the abuser to stay a certain distance from the residence or place of work of the applicant, or to refrain from direct or indirect communication. However some evidence of recent violence or harassment is usually required to obtain such an order. Where such remedies are legally applicable on reserve, enforcement may be a problem. The Ontario legislation also provides for orders of exclusive possession of the matrimonial home and its contents. In considering an application for such an order the court is required to take into account a number of factors including any violence committed against the applicant or any children by the other spouse.[193]

The Prince Edward Island *Victims of Family Violence Act* [194] provides for emergency protection orders and victim assistance orders. An emergency protection order can be made only if a justice of the peace is satisfied that family violence (as defined by the Act) has happened and that the situation is serious and urgent. An emergency protection order can be used for a number of purposes including directing a police officer to remove the abuser from the home, awarding temporary custody of children, giving the victim temporary possession of personal property (such as a car) or giving the victim exclusive occupation of the home. A victim assistance order is intended to provide longer term protection and would be sought when an emergency protection order expires or when the situation is no longer an emergency. A victim assistance order can provide a range of remedies including:

- exclusive occupation of the home for a defined period of time;
- removal of the abuser from the home immediately or within a specified time;
- police supervision of the removal of personal belongings from the home
- direction to the abuser to stay away from identified places;
- temporary custody or day-to-day care of the children;
- temporary possession of personal property.
- additional orders can be made prohibiting the abuser from various acts.

There is a little information available concerning the applicability or enforcement of law dealing with restraining orders or of emergency protection orders under provincial domestic violence legislation to address family violence on reserves.

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[193] *The Domestic Violence Protection Act, 2000*, S.O. 2000, c.33. (not yet proclaimed in force).

[194] *Victims of Family Violence Act*, S.P.E.I. 1996, c.V-3.2.

Difficulties in enforcing restraining orders against partners on reserve was identified by the focus group participants as a major concern. The Report of the Special Representative on Protection of First Nation Women's Rights also identified enforcement as a major problem that women on reserve face.

> Women at the focus group reported that women who are victims of family violence sometimes turn to the courts to seek temporary restraining orders, which would allow them to remain in the matrimonial home with their children. However, after obtaining restraining orders, women are sometimes reportedly told by the RCMP that the band doesn't have the power to enforce the restraining order."[195]

The provincial schemes often provide for orders of exclusive possession of the matrimonial home as part of a package of remedies that can be applied for, and granted simultaneously. The non-applicability of orders for possession and difficulties in enforcing restraining orders means that First Nation women cannot enjoy the full range of remedies available under such legislation, thus undermining its goals and its effectiveness in a reserve context.

Child custody actions are another means by which women seek protection for their children in situations of family violence and marriage breakdown. The effects of a child witnessing spousal abuse are understood to a greater extent in recent years. It is given greater consideration in child custody and access determinations in court. Nicholas Bala concludes that the Canadian courts are recognizing the need for a different response when abuse is involved and that courts are factoring in the nature of the abuse, the effects of that abuse on the children, what the future impact of that abuse will be as well as the risk of immediate harm on the child.[196] In an on reserve scenario, even where a woman may be granted custody of the children, the courts still cannot order exclusive possession of the matrimonial home. Again, First Nation women on reserve are at a disadvantage in accessing a comprehensive package of remedies in situations of domestic violence. As a result, women in these situations are forced to seek shelter elsewhere while the abuser who holds the certificate of possession remains in the matrimonial home.

Where the real property is the only or nearly the only asset of the marriage and where a victim of violence does not hold a Certificate of Possession, then she is essentially without a remedy. In such cases, women cannot obtain an order for exclusive possession of a matrimonial home situated on a reserve, and since a restraining order will not allow her to stay in the matrimonial home, the victim is the one who ends up leaving and has to find alternative accommodations for herself and the children.

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[195] Mavis A. Erickson, "Where are the Women?: Report of the Special Representative on the Protection of First Nation women's Rights", January 12, 2001 at p.50.

[196] Nicholas Bala, "Spousal Abuse in Custody and Access Disputes: A Differentiated Approach" (1996) 13 *Canadian Journal of Family Law* 215.

It is well known, however, that there is a critical shortage of housing on reserves. When additional housing is not available on reserve then First Nation women must live with relatives and friends who will provide them with lodging for a limited period of time. The participants in the Focus Groups raised the critical shortage of housing on reserves as a recurring theme working against women in general and especially those who are involved in an abusive relationship. The norm for women who are fleeing a violent relationship is to leave the reserve in order to find accommodation off-reserve:

> Lack of adequate and affordable housing is one of the most serious problems facing aboriginal women who live off reserve. Ironically, many aboriginal women living off reserve were forced to relocate due to chronic housing shortages on their reserves. Women at the focus group expressed the view that the situation has reached crisis proportions.[197]

The following is an example of the type of extreme crises First Nation women can find themselves in, due to lack of housing on and off reserve:

> An aboriginal woman committed suicide earlier this year after the authorities apprehended her children. The woman, who had five children, was forced to leave her reserve due to a chronic housing shortage. However, she could not find affordable housing off the reserve. Due to her financial situation, she was forced to live at a rundown boarding house with her five children. She sought assistance from the authorities to seek affordable housing for her and her children. The authorities responded by apprehending her five children. At that point the woman sadly lost all hope and took her life.[198]

The lack of available resources for women who find themselves in an abusive relationship means that the women find themselves trapped in the relationship they might otherwise flee. One woman reported that her husband beat her up all of her life and she stayed with him because she had nowhere to go. She stated that if there were safe houses either on the reserve or close to the reserve she could have escaped many years earlier. Another woman said that she lived in a remote community and that she had to escape by plane. This woman felt that if she would have had money available to her to pay the plane fare or a safe place to go on reserve, she could have escaped sooner.[199]

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[197] Mavis A. Erickson, "Where are the Women?: Report of the Special Representative on the Protection of First Nation women's Rights", January 12, 2001, at p.65.

[198] *Ibid*, at p.65-66.

[199] *Ibid*, at p. 87.

The need to empower Aboriginal women through the establishment of First Nations agencies is clear. The Report of the Aboriginal Justice Inquiry of Manitoba stated that, "Aboriginal women said they would be more likely to lay charges to testify if someone were available to explain the court procedure to them, and if they were give emotional support throughout the proceedings."[200]

In addressing the issue of family violence on reserves, the approach must be holistic and community driven. This means looking at the "individual in the context of the family; the family in the context of the community; the community in the context of the larger society."[201] The participants of the Focus groups expressed the view that the involvement of the whole community in dealing with the issue of family violence is necessary. A model geared to the condition of individual communities is the preferred approach rather than a generic approach. Empowering women by disseminating information and educational resources is at the beginning of the healing process for many women.

RCAP Recommendations on Family Violence

The Royal Commission on Aboriginal Peoples examined the issues of domestic violence in Aboriginal communities and heard substantial testimony on the subject. The Commission concluded that "We are convinced that where community standards have been eroded it is possible to re-establish norms of respect for women and protection for vulnerable community members through the advocacy work of community leaders." Consistent with this finding, the Commission made the following recommendations respecting family violence in Aboriginal communities:

> **3.2.6**
> Aboriginal leaders take a firm, public stance in support of the right to freedom from violence of all members in the community, but particularly of women, children, elders, persons with disabilities and others who may be vulnerable, as well as in support of a policy of zero tolerance of actions that violate the physical or emotional safety of Aboriginal persons.
>
> **3.2.7**
> Aboriginal governments adopt the principle of including women, youth, elders and persons with disabilities in governing councils and decision-making bodies, the modes of representation and participation of these persons being whatever they find most agreeable.
>
> **3.2.8**

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[200] *Final Report of the Aboriginal Justice Inquiry of Manitoba,* Volume 1, Chapter 13 – Aboriginal Women, June 29, 2001, at p.10.

[201] Health Canada-National Clearinghouse on Family Violence, *Family Violence in Aboriginal Communities: An Aboriginal Perspective* (Ottawa: Health Canada, 1996, p.43. See also, The Steering Committee on Native Mental Health (Canada), Agenda For First Nations and Inuit Mental Health (Ottawa: Health and Welfare Canada, 1991) p.17.

The full and equal participation of women be ensured in decision-making bodies responsible for ensuring people's physical and emotional security, including justice committees and boards of directors of healing centres and lodges.

3.2.9

Aboriginal leaders and agencies serving vulnerable people encourage communities, with the full participation of women, to formulate, promote and enforce community codes of behaviour that reflect ethical standards endorsed by the community and that state and reinforce the responsibility of all citizens to create and maintain safe communities and neighbourhoods.

RCAP Family Law Recommendations

Like the Focus Group participants, the Report of the RCAP stressed the importance of the larger field of family relationships in which family law issues take place in First Nation communities:

> It is clear that 'the family' in Aboriginal discourse signifies not only the household and smaller circle of immediate kin, but also, as it did in traditional times, a broader caring community that acts as a bridge or mediator between individuals and the world at large.[202]

The analysis of the RCAP on family law issues affecting First Nations[203] can be summarized as follows:

- Based on the common law principle of continuity, constitutional scholars have concluded that certain aspects of customary law pertaining to the family have survived;
- Customary laws on marriage and adoption have been upheld by Canadian common law even in the face of legislation that might be taken to have abridged such laws;
- Acknowledging that it may be some time before full self-government and a new land tenure system for Aboriginal lands are in place, RCAP recommended that Parliament enact an Aboriginal Nations Recognition and Governance Act, to make explicit what is in implicit in section 35 of the *Constitution Act, 1982*, namely that Aboriginal nations constitute an order of government within the Canadian federation and can exercise law-making authority in areas they deem to be core areas of their jurisdiction;
- Family law falls within the core of (inherent) Aboriginal self-government jurisdiction and as such, does not require negotiation of a self-government agreement to be exercised

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[202] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.3, Chapter 2, Section 4, RCAP CD ROM at record 624.

[203] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.3, Chapter 2, Section 4.

Because customary laws in some areas relating to family have been pre-empted by federal and provincial laws, and because of the central importance of family and family relationships, it is likely that Aboriginal people will want to have their own laws in place as soon as possible.[204]

The recommendations of the RCAP clearly favour a recognition of Aboriginal inherent jurisdiction to adopt laws addressing family law issues generally, and see the exercise of this jurisdiction as the most immediate way of ensuring culturally appropriate legal responses are developed as quickly as possible. The exercise of this jurisdiction is seen as the best way to take the immediate action required to address the serious areas of legal vacuum respecting matrimonial real property on reserves. This exercise of inherent jurisdiction would take place pending the negotiation of broader self-government arrangements (that could address related areas such as land management in general and wills and estates).

More specifically, the RCAP recommended with respect to family law:

> **3.2.10**
> Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.
>
> **3.2.11**
> Federal, provincial and territorial governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly.
>
> **3.2.12**
> Aboriginal nations or organizations consult with federal, provincial and territorial governments on areas of family law with a view to
> (a) making possible legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps;
> (b) working out appropriate mechanisms of transition to Aboriginal control under self-government; and
> (c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies.
>
> **3.2.13**
> With a view to self-starting initiatives in the family law area or to self-government, Aboriginal nations or communities establish committees, with women as full participants, to study issues such as
> (a) the interests of family members in family assets;
> (b) the division of family assets on marriage breakdown;

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[204] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (1997) Vol.3, Chapter 2, Section 4.

(c) factors to be considered in relation to the best interests of the child, as the principle is applicable to Aboriginal custody and adoption;
(d) rights of inheritance pertaining to wills, estates or intestacy; and
(e) obligations of spousal and child support.

Violence Against Indian Women Code Project (United States)

In the United States, Indian nations are recognized as having criminal law jurisdiction which is exercised through tribal courts. A recent project carried out by the National American Indian Court Judges Association (NAICJA) analyzed existing tribal codes addressing violence against Indian women (the Violence Against Indian Women Code Project). The NAICJA developed standards to evaluate violence against women codes and examined forty tribal domestic violence codes. None of the forty met all of the standards developed by the NAICJA, but five were considered good examples since they met many of the standards.[205] These codes are more criminal law in nature and do not appear to focus on civil remedies such as exclusive possession of the family home. The NAICJA recently has drafted a model domestic violence code.

The January 28, 2002 draft domestic violence model code defines "domestic violence" in a manner that reflects the broad concept of family relationships typical of many First Nations:

"Domestic Violence" means abuse, mental anguish, physical harm, bodily injury, assault, or the infliction of reasonable fear of bodily injury, between family or household members, or sexual assault of one family or household member by another. All crimes involving threat, violence, assault and physical or sexual abuse against adults, children, elderly or others enumerated in the Tribal Criminal Code or local law enforcement practice may be charged as domestic violence.[206]

The work of the NAICJA was carried out through a grant program of the federal Department of Justice Violence Against Women Office aimed at assisting tribal governments to address the issue of violence against women. The program aims to encourage the development of codes that include the power to issue civil protective orders as well as other law enforcement strategies and victim assistance services.[207]

Conclusions

The very concept of "matrimonial real property" carries with it assumptions of competing individual rights and interests in land, in the family home and other family "assets". These assumptions are generally not consistent with First Nation communal traditions and values in relation to property or family.

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[205] Information about the Violence Against Indian Women Code Project and examples of the codes considered the best examples, can be found on the Website of the National American Indian Court Judges Association at http://www.naicja.org. The five best codes are also available at this site.

[206] National American Indian Court Judges Association, *Model Domestic Violence Code*, http://www.naicja.org.

[207] Information about the grant program can be found in the Catalog of Federal Domestic Assistance at http://aspe.os.dhhs.gov/CFDA .

The *Indian Act* has had many negative cultural impacts on the integrity of First Nation communities and culture and on the position of women in their communities and their relationship to the land. The introduction and imposition of individual land interests combined with patriarchal biases in areas such as Indian status, band membership and the granting of individual allotments of reserve land have created numerous cultural tensions and complex policy issues that affect matrimonial real property issues on reserve in almost every aspect.

For most First Nations women on reserve, the collective effect of the Canadian legal system as it currently stands - the colonial and patriarchal biases of the federal *Indian Act* over a long period, the lack of applicable federal, provincial or First Nations laws on matrimonial real property matters, the inapplicability on reserve of some aspects of family violence protection laws, decisions by band councils regarding band membership, housing and land allotments, the lack of housing and land in many reserve communities and problems related to enforcement of applicable federal, provincial and First Nation laws – results too often in a lack of protection and a lack of very basic legal remedies relative to the situation of Aboriginal and non-aboriginal people off reserve.

There are several distinct legal regimes governing land issues on reserve – the *Indian Act*, the *FNLMA* and a range of self-government and land claims agreements. There is also a range of legal opinion on the extent to which the Constitution of Canada contemplates the exercise of inherent First Nation jurisdiction over family law matters independent of a self-government agreement between a given First Nation and the federal Crown.

The legal situation of First Nation people across the country with respect to matrimonial real property varies according to the specific legal regime governing land issues in their communities and the extent to which it affords room for the exercise of First Nation jurisdiction (inherent or delegated) or the adoption or incorporation of provincial family law.

Apart from the question of inherent First Nation jurisdiction, the current state of the law and of federal policy in respect to matrimonial real property can be summarized as follows:

1. No *Indian Act* provisions specifically address the issue of matrimonial real property rights on reserve;
2. Provincial/territorial matrimonial property legislation cannot apply to alter any interests granted to individuals under the *Indian Act* in unsurrendered reserve lands, including interests in such lands that fall within the meaning of matrimonial property of the jurisdiction concerned (unless the application of such provincial laws to a given reserve is negotiated through a self-government or land claims agreement);
3. Provincial/territorial matrimonial property legislation may apply to leasehold interests in designated reserve lands;

4. Within the framework of federal policy as it currently stands, the only existing options for First Nations to escape the *Indian Act* status quo and its silence on matrimonial real property, is through negotiation of an agreement to come under the *FNLMA* or negotiation of a self-government or claims agreement (where such negotiation processes are available to the First Nation in question).

In considering new policies, programs or legislative initiatives (whether federal or First Nation) in relation to matrimonial real property issues on reserve, there are several important policy considerations that flow from the review of legal and policy issues in this paper. The list below is not intended to be exhaustive.

1. Different Reserve Land Management Regimes

From a national perspective, there are, generally speaking, three different categories of reserve land management situations: 1) reserves that are subject to the *Indian Act* land management regime; 2) reserves that have opted into the *FNLMA* and operate under First Nation designed land management codes; and 3) reserves belonging to First Nations who have negotiated self-government or land rights agreements with new land management regimes (and other aspects of self-government). There are also First Nations in the process of moving from one of these situations into another as a result of ongoing self-government or *FNLMA* negotiations.

Any initiative to address matrimonial real property rights on reserve must take into account these different legal regimes, and the different situation and needs of First Nation women in each of them.

For example, *FNLMA* communities are required to adopt a law respecting the division of matrimonial real property on marriage breakdown as part of a comprehensive land code. In these communities, decision-making responsibility clearly lies with the First Nations leadership who have a responsibility to consider and act on the issue as called for by the *FNLMA*. For *Indian Act* communities on the other hand, the Act is silent on the question and there is no specific law-making power recognized in the area of division of matrimonial property rights on reserve. It may be that there is an inherent power yet reserved to such First Nations in the absence of federal legislation on the subject. The result is that the subject of matrimonial real property is unaddressed for the vast majority of First Nation reserves under the *Indian Act* land management regime.

Another important consideration is that the differences between these different legal regimes means that matrimonial real property issues on reserve are being addressed more comprehensively in some reserve communities than others.

2. Source and Scope of Lawmaking

A key question to answer is whether legislative action should be left entirely to First Nations (continuing and extending the approach taken under the *FNLMA*) or whether any form of national legislation is needed or desirable to meet the policy principles and considerations set out in this paper.

The answer to this question may turn on one's perspective of what constitutes an appropriate use of federal legislative power pursuant to s. 91(24) or any other federal head of power. The AFN has taken policy positions in the past that the federal government cannot (consistent with its stated commitment to self-government or its constitutional obligations to Aboriginal peoples) enact legislation affecting the rights and interests of First Nations without First Nation consent. Some First Nation women's advocates on the other hand, have said the federal government has a duty to ensure that First Nation women have access to the same level and scope of protection and remedies as women off reserve with respect to matrimonial real property; and this duty includes enacting appropriate federal legislation for this purpose.

If First Nations are to be recognized as having lawmaking powers in this area, the question of the scope of such a power is an important one. Properly addressing matrimonial real property issues on reserve will involve more than merely adding a line to the by-law powers under the *Indian Act*. Careful thought must be given to the description of the lawmaking power required and the implications for First Nation authority over land and family law in general.

3. Impact on other Areas of Law

Legislative initiatives in regard to matrimonial real property issues must consider related areas of law, and how these may or should be affected – e.g., wills and estates, marriage and divorce.

Any proposed federal reforms would need to contemplate possible legal and policy implications for communities under the *FNLMA* and other communities in the process of negotiating self-government agreements or agreements relating to the *FNLMA*.

4. Gender Equality Concerns

The concept of gender equality raises a number of policy issues given the diverse views on what it means and its implications for First Nation communities. Gender equality in a First Nation context is especially challenging to "contextualize" in a situation where First Nations are dealing with many other outside legal concepts and policy objectives of other levels of government. Conducting gender equality analysis in a First Nation context will require incorporating the spectrum of equality issues facing First Nation women and identifying means of empowering women and their communities. For example, it must be recognized that the vulnerability of First Nation women and their children dealing with the trauma of marriage or relationship breakdown is made more acute by cultural upheaval and in some cases, family violence.

5. The Interests of Children

The interests of children on breakdown of a marriage, common law or same-sex relationship should be paramount. In this regard, the need for shelter, a stable home environment and parental support are a few important considerations as well as the right to stay within the community and have access to the child's culture and community. These goals can be challenging to meet where a custodial parent or guardian does not share the same legal status as the child with respect to band membership. The manner in which the legal principle of the "best interests of the child" is applied in a First Nation context is a key policy concern of First Nation women.

6. Resource and Capacity Needs of Women at the Community Level

Even where First Nations leadership have specific legal obligations to address the issue of matrimonial property rights on reserve, it is less clear whether women with such interests on reserve enjoy the conditions necessary for them to be able to participate meaningfully in community discussions and to acquire the information they need to have input and influence on the content of First Nations laws in this area to meet their needs.

First Nations women at the community level require information on the current status of the law in this area, and assistance and support to have input into any process of reform at any level of government. The role of the federal government in funding First Nation women's organizations or community legal services organizations to carry out such work needs to be considered.

7. Scope of Relationships

There is a need to determine the scope of any proposed initiatives affecting the rights of opposite-sex couples on reserve – whether married under provincial law, married under traditional/Aboriginal law or living common law. At the same time, notions of family and the rights of common law and same-sex couples continue to evolve under provincial and federal law in many areas including matters in relation to marriage and matrimonial property. The treatment of common law couples requires consideration of whether matrimonial property law should be applied, and if so, on a mandatory or opt-in basis.

The different situation of people on reserve with respect to Indian status, band membership or First Nation membership must be considered as it can affect access to certain property interests on reserve and capacity to enforce judgments against an "Indian" spouse resident on reserve.

8. Land and Housing Situations

The severe lack of housing and suitable land for housing is a critical reality for many First Nations. In such situations, the need of couples for assistance and guidance on their legal rights and interests and the best way to address the rights and interests of both parties fairly, is great. The need for clear legal guidelines, whether federal or First Nations in origin, is underlined in situations where housing is a scarce commodity. The varied use of the *Indian Act* land allotment process and custom allotment systems must be taken into account, as well as the situation of people living on leased lands or band lands.

In addition, the different types of housing situations on reserve must be taken into account: social housing owned by the band or privately built houses on land held under Certificate of Possession by either or both partners or on band held land.

9. Legal Remedies and Alternative Dispute Resolution

The need for speedy access to remedies such as interim orders for possession of the matrimonial home and issues relating to enforcement, needs to be considered, especially for women in situations of family violence and for women who are the primary caregivers of children. Ultimately, a comprehensive package of remedies and responses (e.g., legal initiatives, programs and housing) should be considered, and not simply one or more legislative options.

The difficulty many First Nation people face in gaining access to the courts is another consideration (e.g. due to distance from home to a major centre with a court, financial limitations, limited access to legal aid resources, lack of knowledge or comfort with European-based legal system, lack of familiarity of Canadian courts with First Nation cultural context). There are a range of views on whether this issue should be addressed by alternative dispute resolution mechanisms established by federal legislation (such as a specialized tribunal that could assist in matrimonial real property issues on reserve) or in the larger context of First Nations and the administration of justice (such as proposals for a First Nation justice system) or by more limited community initiatives such as elders councils.

10. Community Legal Aid and Mediation Services

The letter of the law is primarily used by persons resorting to the courts with resources to hire legal counsel to advise them on their rights and how to protect their interests. Legislative amendments alone will not address the need to help couples to resolve matrimonial real property issues through agreement as much as possible without expensive court actions.

The limited access of First Nation women to community legal aid services and to mediation services also must be considered. Cut-backs in such services have occurred in many provinces. Mediation services must take into account the particular cultural context of a given First Nation, and the vulnerability of women in situations of family violence. Where legislation requires mediation, some consideration has to be given to the ability or inability of individuals to pay for such services.

11. Information-sharing and Consultation

The need to raise understanding of matrimonial real property issues at the community level as well as the timing and manner of consultations in respect to any legislative and/or non-legislative options are important considerations.